IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

H.V.Z.

Petitioner/Appellant

v.

United States

Respondent/Appellee

and

TSgt Michael K. Fewell

Real Party in Interest

BRIEF FOR PETITIONER / APPELLANT

Crim. App. Dkt. No. 2023-03
USCA Dkt. No. _____

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STATEMENT OF STATUTORY JURISDICTION

On 11 September 2023, the Department of the Air Force's Judge Advocate General, Lt Gen Charles Plummer certified this case for review pursuant to Article 67(a)(2) seeking review of H.V.Z.'s Petition Under Article 6b for Relief in the Form of a Writ of Mandamus.

STATEMENT OF THE CASE

On 11 May 2023, the detailed Military Judge issue a court order to 56th Medical Group to turn over to Government counsel all medical records

maintained at their location, redacting or withholding confidential communications with mental health providers. Attachment I to Cert. at 118. Government counsel is to then review all records and turn over to Defense those deemed relevant. Attachment I to Cert. at 113. The Military Judge found "the content of the records from the date of the first charged offenses, that is 19 January 2020 through present day is relevant to defense preparation," but ordered production of all records "maintained at the 56th Medical Group, or any subordinate clinic," regardless of date, relevance, and despite Victims' Counsel highlighted the records contained information protected from disclosure under Health Insurance Portability and Accountability Act of 1996 (H.I.P.A.A.) and potentially Military Rules of Evidence (M.R.E.) 513 and 514. *Id.*; 42 U.S.C. §§ 1320d through 1320d-8 (implemented in 45 C.F.R. §§ 164.500-534)(hereinafter "H.I.P.A.A.") There are no other actions pending before any other court. The Military Judge refused to acknowledge H.V.Z.'s objection to production of her DoD Health Record[1] as he denied "standing."

STATEMENT OF FACTS

On 10 January 2023, the Commander, Air Education and Training

[1] The DoD Health Record is "the primary record of medical, dental, and mental healthcare documentation, regardless of medium, for individuals receiving care in the [military health system]." DHA-PM 6025.02 *DoD Health Record Lifecycle Management, Volume 1: General Principles, Custody and Control, and Inpatient Records* at 14 (Nov. 23, 2021)

Command, referred one Charge and two Specifications of sexual assault, in violation of Article 120, U.C.M.J., one Charge and two Specifications of domestic violence, in violation of Article 128b, U.C.M.J., and one Charge and two Specifications of wrongful use of a controlled substance, in violation of Article 112a, U.C.M.J., in *United States v. TSgt Michael K. Fewell*. Attachment I to Cert. at 37-38. On 28 April 2023, TSgt Fewell's (Accused) Defense counsel filed a motion to compel discovery of H.V.Z.'s medical and Family Advocacy Program (FAP)[2] records. Id. at 41. Defense relayed "[b]ecause long-term medical conditions that could affect perception and memory may have been addressed in previous earlier appointments that may not have been followed up on or disclosed in subsequent appointments, it is necessary to evaluate the entirety of the record that exists within military possession." Id. at 52. On 4 May 2022, the Government filed its response. Id. at 107. Trial counsel (hereinafter "T.C.") concurred Defense had not met its burden and there was no basis to believe a majority of the records existed, but argued that an "appropriate, neutral, and

[2] DoD Instruction 6400.01 promulgates the Family Advocacy Program, among other things, the program "[p]rovide[s] trauma-informed assessment, rehabilitation, and treatment to persons who are involved in alleged incidents of child abuse and neglect, domestic abuse, and problematic sexual behavior in children and youth who are eligible to receive treatment at a military treatment facility." DoDI 6400.01 para 1.2c., *Family Advocacy Program*, May 1, 2019. The Military Health System provides treatment for the Family Advocacy Program; thus those records are often part of an individual's medical records.

detached attorney"[3] should review FAP records from the charged timeframe for relevant information. Id. at 110. No party requested oral argument.

H.V.Z. responded asserting, through counsel, violation of her rights under H.I.P.A.A. and Article 6b, U.C.M.J., if the Government obtained the DoD Health Record without the required showing under Rule for Court-Martial (R.C.M.) 703 and H.I.P.A.A.. Id. at 95-105. If the Military Judge ordered production of the records, H.V.Z. requested the Military Judge conduct *in camera* review to determine whether they are relevant and necessary under R.C.M. 703. Id. at 105.

The Military Judge issued his ruling on 11 May 2023. Attachment I to Cert. at 118-119. The ruling noted dismissal of H.V.Z.'s response due to lack of standing. Id. at 113. The Military Judge concluded: "the defense is entitled to discovery of the named victim's medical records and non-privileged mental health records relevant to the charged offenses that are maintained by the medical treatment facility located at Luke Air Force Base." Id. at 115. The

[3] It is unclear what authority contemplates an attorney not detailed to or appearing at the court-martial performing this function. In fact, the Fourth Circuit overruled a District Court's refusal to enjoin the US Government from using a filter team to review privileged documents as, "use of the Filter Team is improper for several reasons, including that, inter alia, the Team's creation inappropriately assigned judicial functions to the executive branch." *United States v. Under Seal*, 942 F.3d 159, 164 (4th Cir. 2019). The opinion goes on to say, "a court simply cannot delegate its responsibility to decide privilege issues to another government branch." *Id*. at 177. Military Judges engaging in judicial functions should not delegate their responsibility or encourage such extrajudicial practice. Moreover, it remains unclear how the documents reviewed by an "appropriate, neutral, and detached [from the court-martial]" attorney are inserted into the Record for preservation on appeal. Even if all documents are in the Record, the actions of this attorney would be subject to no appellate review.

Military Judge ordered TC to, "identify what medical records, nonprivileged mental health records, and nonprivileged Family Advocacy records of the named victim are within the possession, custody, or control of military authorities, located at Luke Air Force Base, including those generated before, during, and after the charged timeframes" and, if trial counsel determines them relevant, "discover such information to the Defense." Id. at 116.

The A.F.C.C.A. denied H.V.Z.'s writ petition based on the high standard of review relying on 1) the plain meaning of R.C.M. 701(a)(2)(A), and 2) the test laid out by this Court in *United States v. Stellato*, 74 M.J. 473, 484-85 (C.A.A.F. 2015). *In re H.V.Z.*, No. 2023-03, 2023 CCA LEXIS 292, at *15-16 (A.F. Ct. Crim. App. 2023) (unpub. op.). Specifically, with respect to R.C.M. 701(a)(2)(A), the A.F.C.C.A. found "medical records maintained by the [local military treatment facility] would seem to fall within the plain meaning of 'papers, documents, [and] data . . . within the possession, custody, and control of military authorities' . . . and the military judge did not clearly and obviously err in reaching that conclusion." *Id*. Likewise, regarding the *Stellato* standard, the A.F.C.C.A. found that "*at least arguably*, in the instant case trial counsel would have had knowledge, access, and a legal right to obtain Petitioners medical records . . ." simply because the records were housed at the local military treatment facility (hereinafter "M.T.F."). *Id.* (emphasis added)

On 16 May 2023, H.V.Z. filed the Petition for Writ of Mandamus for which

she now seeks review. The Government and Real Party in Interest responded to H.V.Z.'s Petition on 8 June 2023, and H.V.Z. replied on 15 June 2023. The A.F.C.C.A. issued its opinion on 14 July 2023. Under Article 67(a)(2), U.C.M.J., The Judge Advocate General of the Air Force certified the issues in this case for this Court's review on 11 September 2023.

Beginning in approximately 2004, H.V.Z. was the dependent of Navy member. Id. at 44. H.V.Z. divorced the Navy member and began a relationship with TSgt Fewell in 2014. Id. at 40. H.V.Z. and TSgt Fewell married in 2016. *Id*. All charged offenses occurred during her relationship with TSgt Fewell, between 1 January 2020 and 31 March 2021. Id. at 37-38. H.V.Z. and TSgt Fewell divorced on 2 November 2021.

"The 56th Medical Group, located near Phoenix, is an outpatient only Medical Treatment Facility (M.T.F.)." 56th Med. Grp. Public homepage, (Aug. 11, 2023, 2:37 PM) https://www.luke .af.mil/Units/56th-Medical-Group/. It is a component of the Defense Health Agency providing health care services and has no law enforcement function. Id.

Currently, there are no medical personnel at the 56th Medical Group providing H.V.Z. medical treatment or with a need to access her health record. As H.V.Z. is a civilian, the 56th Medical Group is not in any position of authority over her.

STANDARD OF REVIEW

"Because this issue involves a legal determination of the meaning of in the possession of [military authorities], we review it de novo." *United States v. Santiago*, 46 F.3d 885, 893 (9th Cir. 1995) (internal citations omitted); *see also LRM v. Kastenberg*, 72 M.J. 364, 369 (C.A.A.F. 2013) ("Construction of a military rule of evidence, as well as the interpretation of statutes, the U.C.M.J., and the R.C.M., are questions of law reviewed *de novo*.").

The question of what standard of review applies for a writ of mandamus under Article 6b, U.C.M.J. is the third certified issue in this case. There are two possible conclusions: The Crime Victims' Rights Act (hereinafter "C.V.R.A.") requires Federal Courts of Appeals to "apply ordinary standards of appellate review." 18 U.S.C. § 3771(d)(3). Namely, appellate courts applying the C.V.R.A. "must issue the writ whenever we find that the district court's order reflects an abuse of discretion or legal error." *Kenna v. United States Dist. Court*, 435 F.3d 1011, 1017 (9th Cir. 2006); *see also In re Stewart*, 552 F.3d 1285, 1288-89 (11th Cir. 2008) (issuing a writ of mandamus pursuant to the C.V.R.A. without demanding a showing of clear and indisputable grounds for relief). Whereas, under the All Writs Act, "to prevail on a petition for a writ of mandamus, the petitioner must show that: (1) there is no other adequate means to attain relief; (2) the right to issuance of the writ is clear and indisputable; and (3) the issuance

of the writ is appropriate under the circumstances." *Hasan v. Gross*, 71 M.J. 416, 418 (C.A.A.F. 2012)(internal quotations omitted). For a full discussion on the applicable standard of review in this petition, see section III below.

SUMMARY OF ARGUMENT

The Military Judge erred by applying the *disclosure* rules of R.C.M. 701(a)(2)(A) and R.C.M. 701(a)(2)(B) to H.V.Z.'s DoD Health Record instead of the *production* rules of R.C.M. 703(g)(3)(C)(ii) and R.C.M. 703(g)(3)(G). Specifically, he erroneously determined such medical records—which neither party has proffered even exist, which trial counsel has never reviewed, and which trial counsel does not plan to use for its case-in-chief—are in the possession, custody, or control of military authorities. However, the term "military authorities" is a term of art that clearly and indisputably means "military investigative authorities." Moreover, the Military Judge misapplied this Court's opinion in *Stellato* stretching the doctrine of "constructive possession" beyond the strictures of the plain text of rules creating absurd and dangerous precedent that would render all medical records housed at M.T.F.s (including any factfinders' medical records) susceptible to discovery under R.C.M. 701(a)(2)(A), (B). In sum, military authorities did not have possession, custody, nor control of H.V.Z.'s DoD Health Record, meaning they had no knowledge of nor access to the records, nor did they have a legal right to the record (aside from requesting that right through

subpoena).

The Military Judge erred in finding H.V.Z. lacked standing to object to the discovery of her own medical records. R.C.M. 703(g)(3) clearly affords crime victims the right to object and move for relief to the disclosure of medical records, but even if it did not, H.V.Z.'s statutory and constitutional rights to privacy are meaningless if she cannot seek redress at trial.

Writ petitioners are not required to show clear and indisputable error for appellate courts to issue a writ of mandamus. As a starting point, legal questions within a writ of mandamus are, and always should be, reviewed *de novo*—as this Court demonstrated in *LRM v. Kastenberg*, 72 M.J. 364, 369 (C.A.A.F. 2013). Moreover, the high standard of review associated with petitions under the All Writs Act is inapplicable because Congress issued a specific, independent grant of jurisdiction under Article 6b(e) for victims to seek relief. In this sense, Article 6b, U.C.M.J. acts precisely like its federal counterpart, the C.V.R.A. (18 U.S.C. § 3771(d)(3)), which applies ordinary standards of appellate review.

Finally, this Court should issue a writ of mandamus to H.V.Z. because she was denied due process under Article 6b, U.C.M.J. and R.C.M. 703(g)(3)(C)(ii), and a contrary holding would lead to an absurd, potentially dangerous precedent. The Military Judge ordered her private DoD Health Record to be discovered and examined simply because it was housed at the M.T.F. as opposed to a civilian

provider. The Military Judge refused to afford H.V.Z. the right to be heard on this question of her own medical records despite R.C.M. 703(g)(3)(C)(ii) clearly contemplating this exact scenario. Finally, denying relief in this instance sets an untenable precedent. Any trial litigators could ostensibly secure any M.T.F. records for any individual—including but not limited to: opposing counsel, the accused, the military judge, and the panel members all without standing to object. For these reasons, as described in detail below, this Court should issue relief to H.V.Z. in the form of a writ of mandamus.

ARGUMENT

I. THE MILITARY JUDGE ERRED IN DETERMINING H.V.Z.'S DOD HEALTH RECORD WAS IN THE POSSESSION, CUSTODY, OR CONTROL OF MILITARY AUTHORITIES PURSUANT TO R.C.M. 701(a)(2)(A) AND R.C.M. 701(a)(2)(B).

The Military Judge erred by applying R.C.M. 701(a)(2)(A) to H.V.Z.'s DOD Health Record because a) the M.T.F.s are not a "military authorities," b) the actual military authorities do not have constructive possession, custody, or control of H.V.Z.'s DOD Health record, and c) applying R.C.M. 701(a)(2) to DoD Health Record housed at an M.T.F. leads to an absurd result.

a. M.T.F.s are not "military authorities."

The A.F.C.C.A. denied H.V.Z.'s writ petition based, in part, on the conclusion that "medical records maintained by the 56 MDG would seem to fall within the

plain meaning of . . . military authorities . . . ." *In re HVZ*, 2023 CCA LEXIS 292, at *16. This is legal error that should be reviewed de novo, but also constitutes clear and indisputable error.

R.C.M. 701(a)(2)(A) states, "the Government shall permit the defense to inspect any books, papers, documents, data . . . or copies of portions of these items, if the item ***is in the possession, custody, or control of military authorities***." (emphasis added). "[M]ilitary authorities" is a term of art specifically referring to "the prosecution team." *Stellato* at 484;[4] *see also United States v. Brazel*, 102 F.3d 1120, 1150 (11th Cir. 1997) (refusing to interpret the concept of "government possession" broadly because "[b]inding precedent has construed the term 'government' in Rule 16(a)(1)[5] to refer to the 'defendant's adversary, the prosecution . . .'" as opposed to the federal government writ large.). As a matter of exegesis, "[u]nless ambiguous, the plain language of a statute will control unless it leads to an absurd result." *United States v. King*, 71 M.J. 50, 52 (C.A.A.F. 2012) (citation omitted). However, "[w]hether the statutory language is ambiguous is determined 'by reference to the language itself, the specific context

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[4] While *Stellato* makes certain allowances for constructive possession, its position on who "military authorities" are is clear: they are prosecutors (regardless of whether they possess the evidence physically or constructively). More on why the prosecution team does not constructively possess medical records at M.T.F.s below.

[5] Fed. R. Crim. P. 16(a)(1) is the federal civilian counterpart to R.C.M. 701(a)(2)(A).

in which that language is used, and the broader context of the statute as a whole.'" *United States v. McPherson*, 73 M.J. 393, 395 (C.A.A.F. 2014) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)). Accordingly, under R.C.M. 701(a)(2)(A), the meaning of military authorities is plain: "trial counsel . . . ha[s] a duty to seek out and examine the [records] in the possession of military investigative authorities," not medical providers. *See United States v. Simmons*, 38 M.J. 376, 381 (C.A.A.F. 1993) (emphasis added); *see also United States v. Harrow*, 62 M.J. 649, 661 (A.F. Ct. Crim. App. 2006) (distinguishing hospital officials from military authorities—"The military judge asked her why she wanted hospital officials to notify military authorities.").[6]

In discussing trial counsel's disclosure obligations for exculpatory evidence,

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[6] The frequency with which military appellate courts employ the term "military authorities" to describe law enforcement is also telling when considering the plain meaning of the text. *E.g. United States v. Martinez*, 2022 CCA LEXIS 324, at *5 (A.F. Ct. Crim. App. 31 May 2022) (unpub. op.) ("... she reported to civilian law enforcement that Appellant had assaulted her, and military authorities were subsequently notified ...."); *United States v. Piatti*, 2014 CCA LEXIS 21, at *3 (N-M Ct. Crim. App. Jan. 23, 2014) ("Although the local authorities un-cuffed the appellant upon turnover, the military authorities promptly handcuffed him again ...."); *United States v. Hampton*, 2015 CCA LEXIS 188, at *3 (A. Ct. Crim. App. 17 April 2015) ("Appellant lived in Florida until she was arrested ... and turned over to military authorities."); *United States v. Carter*, 1985 CMR LEXIS 3051, at *3 (N-M.C.M.R. 25 November 1985) ("Appellee was charged by military authorities on 15 March 1985."); *United States v. Snyder*, 2020 CCA LEXIS 117, at *4 (A.F. Ct. Crim. App. 15 April 2020) ("Appellant was convicted on the basis of ... evidence uncovered in the investigation when SB reported the incident to civilian and military authorities."); *United States v. Neis*, 2020 CCA LEXIS 60, at *4 (A.F. Ct. Crim. App. 27 February 2020) ("Shortly after the incident, MP reported to military authorities the attempted sexual assault."); *but see United States v. Lizana*, 2021 CCA LEXIS 19, at *11-12 (A.F. Ct. Crim. App. 25 January 2021) (unpub. op.) (finding "MEB discharge records were ... in the possession of military authorities" because "such records existed at AFPC, a component of the Air Force.").

the discussion section of R.C.M. 701(d) draws a clear line between "military authorities" and other agencies intimately involved in the case:

> Trial counsel are encouraged to advise *military authorities* or *other governmental agencies* involved in the case of their continuing duty to identify, preserve, and disclose to the trial counsel or other Government counsel the information required to be disclosed under this rule.

In sum, the term "military authorities" appears twenty times in the M.C.M., but it is never used broadly enough to incorporate an M.T.F. *See, e.g.,* R.C.M. 305(i); Article 85(d); Article 86(c)(10)(d)-(e); Article 131c; Appendix IV. Instead, the M.C.M. uses the term "military authorities" exclusively in the context of criminal law enforcement officials, or this Court put it in *Simmons*: "military investigative authorities." *See id.; Simmons*, 38 M.J. at 381.

Conversely, the plain language of R.C.M. 703 establishes records at an M.T.F. are outside the possession, custody, or control of military authorities. As described in its heading, R.C.M. 703(g)(3)(C)(ii) spells out a detailed subpoena process to acquire "personal or confidential information about a victim." In fact, the rule itself is written specifically with medical records in mind. *See* R.C.M. 703(g)(3)(c)(ii) *Discussion* (2019 M.C.M.). When describing the type of "personal or confidential information of a named victim [that] may be served on individuals," the first such individuals listed are "medical professionals." Likewise, the very first example such an organization housing such information is

"a medical facility." Any caveat that M.T.F.s would be an exception to this general process for procuring medical records is conspicuously absent. *Id*.

Both the Military Judge and the A.F.C.C.A. clearly and indisputably erred in determining the plain meaning of "military authorities" includes M.T.F.s. Technically, one could stretch the linguistic meaning of "military authorities" to reach *all military components*, as the Air Force Court seemed to do in *Lizana.* However, this Court's ruling in *McPherson* (and the Supreme Court in *Shell Oil Co*.) preempted such overreach. Regarding the meaning of military authorities, the text, specific context, and broader context all illustrate that the Military Judge and the A.F.C.C.A. were indisputably wrong in their assessment.

Even if the text were unclear on its face, the context is dispositive: it is nested under R.C.M. 701(a), a section titled "Disclosure by trial counsel," and the M.C.M. itself is riddled with similar uses of the term "military authorities," which invariably refer to military investigative authorities, and never broad military components like M.T.F.s. Finally, the fact that R.C.M. 703(g)(3)(C)(ii) spells out a specific process for procuring a victim's medical records, but offers no suggestion that those rules would be inapplicable for an M.T.F. is an insurmountable problem for the Military Judge and the A.F.C.C.A. Clearly and indisputably, this provision of R.C.M. 703 establishes a subpoena process for medical records—it is the first example given in the rule itself of a "personal or confidential" record that might

bump up against a victim's privacy rights. Where a formal subpoena process is laid out for medical records, it is illogical to presume that process would not apply to a victim

Moreover, the A.F.C.C.A. clearly and indisputably erred giving any deference to the Military Judge on this question because, as the Court in *Santiago* observed, "this issue involves a legal determination of the meaning of 'in the possession of the [military authorities],'" so appellate courts "review it de novo." 46 F.3d 885 The question is whether the Military Judge understood the plain meaning correctly as a matter of law—a question which does not and should not afford him any deference. In sum, H.V.Z.'s medical records are not subject to the disclosure rules of R.C.M. 701 because M.T.F.s are not military authorities as established by text.

b. Military authorities do not have constructive possession, custody, or control of H.V.Z.s DOD Health record.

While there are certain, rare exceptions where evidence is not in the *physical* possession of the prosecution team but is in the *constructive* possession of military authorities, this in not one of those circumstances. *Stellato*, 74 M.J. at 484. The Military Judge found—and the A.F.C.C.A. determined it was "at least arguably" correct for the Military Judge to conclude—that "trial counsel would have had knowledge, access, and a legal right to obtain [H.V.Z.]'s medical records."

In re H.V.Z., at *16 (citing *Stellato*, 74 M.J. at 484-85.) However, a review of *Stellato* and its legal foundations suggest the exact opposite.

In *Stellato,* this Court established four circumstances in which evidence is constructively in the possession of the prosecutors, two of which are relevant here: "when (1) the prosecution has both knowledge of and access to the [evidence]; [and] (2) the prosecution has the legal right to obtain the evidence." *Stellato*, 74 M.J. at 484-85.

i. Knowledge and Access

In *Stellato*, this Court established the knowledge and access exception relying wholly on two federal court precedents: *United States v. Bryan*, 868 F.2d 1032, 1037 (9th Cir. 1989) and *United States v. Libby*, 429 F. Supp. 2d 1, 7 n.11 (D.D.C. 2006), neither of which suggest prosecutors have constructive knowledge or access to medical records. *Stellato*, 74 M.J. at 484-85 n.10. In *Bryan*, the Ninth Circuit found a "prosecutor will be deemed to have knowledge of and access to anything in the possession, custody or control of any federal agency *participating in the same investigation of the defendant*,"[7] But while *Bryan* does acknowledge

[7] However, even this holding should not be liberally constructed because, although the Ninth Circuit found the defense *might* be entitled to access the documents because the IRS was a "federal agenc[y] participating in the same investigation of the defendant," the Court refused to grant relief; instead it remanded the case because it could not "determine, on the basis of the record before [it], the extent to which the prosecution had knowledge of and access to the documents. . . ." *Id.*

"knowledge and access" can occur in joint investigations, it also went on to specify: "[w]e agree that a federal prosecutor need not comb the files of *every federal agency* which might have documents regarding the defendant in order to fulfill his or her obligations under Rule 16(a)(1)(C)" recognizing such a rule "would not only wreak havoc, but would give the defense access to information not readily available to the prosecution." *Id.*

Likewise, in *Libby*, a high-ranking official accused of disclosing classified information was entitled to records housed in the Central Intelligence Agency (CIA) and the Office of the Vice President (OVP). *Libby*, 429 F. Supp. 2d at 4. The DC Court found prosecutors had the requisite knowledge and access to these documents because "there ha[d] been a rather free flow of documents to [prosecutors] from both the OVP and the CIA." *Id.* at 11. This unbridled access and cooperation made the CIA and OVP "closely aligned with the prosecution," as they "contributed significantly to the investigation." *Id.* Thus, *Libby* stands for the proposition that when government entities open their doors to the prosecution team allowing them "access to a plethora of documents . . . likely essential to the prosecution of th[e] case," that same prosecution team cannot then turn around and "disclaim all responsibility for obtaining . . . documents [from the same entity] that are material to the preparation of the defense." *Id.; see also United States v. Frantz*, 2020 CCA LEXIS 404, at *27-28 (A.F. Ct. Crim. App. 10 November 2020)

(unpub. op.) (finding "AFOSI's continued access to JZ's Facebook account during the investigation and trial brought it within the Government's control for purposes of discovery under R.C.M. 701(a).").

More to the point, prosecutors cannot claim a lack of knowledge or access to relevant evidence when they willfully refuse to accept it from a cooperating agency. *Stellato* at 486. In *Stellato*, the victim's mother had "evidence about [her daughter's] sexual assault allegations[8] . . . in a box that was sitting on the table in the kitchen," which she eventually offered to the prosecutors who refused it saying: "I can't do that, everything I get will go to defense." *Stellato* at 477. Put prosaically, *Stellato* found prosecutors cannot avoid knowledge and access to relevant evidence by deliberately sticking their heads in the sand when an agency freely offers it up. *Id.* at 484.

When prosecutors do not have an agency's evidence in their own files nor intend to "utiliz[e] access to it in preparing [their] case for trial," they do not have the knowledge or access needed to establish constructive possession. *Stellato* at 484. For example, in *McClure*, before trial, the victim told prosecutors she kept a diary—a fact prosecutors then disclosed to defense saying "the diary may contain information relevant to the defense." *United States v. McClure,* 2021 CCA LEXIS

[8] "The box also contained a note on which [the mother] recorded a recantation by [the victim]." *Stellato*, 74 M.J. at 477.

454, at *5 (A. Ct. Crim. App. 2021) (unpub. op.); aff'd by *United States v. McClure*, 83 M.J. 14 (C.A.A.F. 2022). However, the Army Court refused to find military authorities had knowledge or access to the evidence stating:

> In *Stellato*, the government had access to relevant and material evidence (i.e., the "box of evidence") by simply asking for it. In the case at bar, the government lacked such access. The prosecutor in *Stellato* affirmatively and specifically declined to examine the contents of the "box of evidence" despite the witness's explicit offer for him to do so. In the case at bar, victim did not offer the government, or defense, the opportunity to review her diary.

Id.

Importantly, in assessing the knowledge and access of military authorities, one must remember "the defense counsel . . . shall have an equal opportunity to obtain . . . evidence," not a greater opportunity. Article 46, U.C.M.J., 10 U.S.C. § 846; *see United States v. Williams*, 50 M.J. 436, 442 (C.A.A.F. 1999) ("The prosecutor's obligation under Article 46 is to remove obstacles to defense access to information and to provide such other assistance as may be needed to ensure that the defense has an equal opportunity to obtain evidence."). If prosecutors cannot readily access relevant records, the defense is not entitled to ready access either—at least not via disclosure. *United States v. DeLeon*, 323 F. Supp. 3d 1273, 1280-82 (D.N.M. 2018) (finding no disclosure requirements under Fed. R. Crim. P. 16 for medical records housed in a federal prison because "the United States

cannot obtain health records that [a confinement facility] possesses by picking up the telephone, so those records are not within the United States' "possession, custody, or control."). In *Crump*, local law enforcement officials would not provide military authorities access to relevant evidence, without subpoenas, surrounding an M.R.E. 413 witness's allegation, so the Air Force Court held:

> We see nothing in the record of trial to show that the trial counsel had access to [the witness's] SAFE report, the condom, the CD of photographs, or any purported forensic testing results. Without having access to these materials, the trial counsel could not use them to prepare for trial. The record of trial before us shows the trial counsel had the same access as the defense counsel to these objects—none.

United States v. Crump, 2020 CCA LEXIS 405, at *104-05 (A.F. Ct. Crim. App. 10 November 2020) (unpub. op.); review denied *United States v. Crump*, 81 M.J. 177 (C.A.A.F. 2021). Even less allowance is made when the defense is seeking records that may not even exist. *United States v. Lorance*, 2017 CCA LEXIS 429, at *12 (A. Ct. Crim. App. 27 June 2017) (unpub. op.) ("While we have long held that the rules of military discovery are generous, we decline to now require trial counsel to seek out and search into the abyss of the intelligence community for the potential existence of unspecified information."); review denied *United States v. Lorance*, 77 M.J. 136 (C.A.A.F. 2017).

Here, military investigative authorities had no knowledge of or access to

H.V.Z.'s medical records housed at the local M.T.F., the 56th Medical Group. Likewise, *Stellato* is completely inapposite to the circumstances of this case. With respect to *Stellato*, an excerpt from *McClure* can be directly applied to H.V.Z.'s circumstance:

> In *Stellato*, the government had access to relevant and material evidence (i.e., the "box of evidence") by simply asking for it. In [H.V.Z.], the government lacked such access. The prosecutor in *Stellato* affirmatively and specifically declined to examine the contents of the "box of evidence" despite the witness's explicit offer for him to do so. In [H.V.Z.], the [M.T.F.] did not offer the government, or defense, the opportunity to review [H.V.Z.'s DoD Health Record].

See U.S. v. McClure, 2021 CCA LEXIS 454, at *11.

The case most analogous to the issues at bar is *Crump*. Just as the local Sheriff's department would "not speak to [military authorities] without subpoenas," here, the M.T.F. will not and cannot provide H.V.Z.'s DoD Health Record without demonstration of H.I.P.A.A. compliance. The A.F.C.C.A.'s explanation on lack of knowledge and access in *Crump* is directly applicable here:

> We see nothing in the record of trial to show that the trial counsel had access to [H.V.Z.'s DOD Health Record] . . . . Without having access to these materials, the trial counsel could not use them to prepare for trial. The record of trial before us shows the trial counsel had the same access as the defense counsel to these objects—none.

See Id. at *104-05.

In short, it was clear and indisputable error for the Military Judge and the A.F.C.C.A. to rely on *Stellato* in determining trial counsel had constructive possession, custody, or control of medical records and either knowledge or access to H.V.Z.'s DoD Health Record housed at the 56th Medical Group. *Stellato*, and the federal precedents on which it rests, suggest only one thing: if prosecutors get free access, so does the defense. Relying on these cases to suggest prosecutors have knowledge or access to H.V.Z.'s DoD Health Record, which is protected by H.I.P.A.A. and the Privacy Act, is unquestionably wrong.

ii. Legal Right

Stellato also allows for constructive possession, custody, or control of evidence when "the prosecution has a legal right to obtain the evidence." *Stellato*, at 485. On this point, the A.F.C.C.A. found the Military Judge did not commit clear error because:

> H.I.P.A.A., read in conjunction with its implementing regulations, with Article 46(a), U.C.M.J., and with R.C.M. 703(g)(2), facially permits trial counsel to obtain evidence under the control of the "Government"—in [*In re AL*] records maintained by an Army military treatment facility—using an "administrative request" that meets certain criteria, rather than a court order.

In re HVZ, 2023 CCA LEXIS 292, at *16; referencing *In re A.L.*, 2022 CCA LEXIS 702 (A.F. Ct. Crim. App. 2022). This holding is legal error that should be reviewed *de*

novo, but is also clear and indisputable error because 1) an "administrative request" is a legal process to obtain records, not a legal right, and 2) compliance with an administrative request is not "required by law." Even if this process is a legal right, the governing statute and additional implementing regulations show the process requires careful balancing and does not give the TC unfettered access to the records.

First, an administrative request[9] under H.I.P.A.A. is "[a] legal 'process' to obtain evidence, like a subpoena, [which] is not the same thing as a legal 'right' to such evidence." *See Crump*, 2020 CCA LEXIS 405, at *105-07. As Judge Stucky points out in his concurrence, the "legal right" exception from *Stellato* "is based on one sentence in an opinion of a federal district court, without any citation to authority, which concerns the legal right of the government to obtain materials from an accused based on a deferred prosecution agreement [DPA]." *Stellato*, at 492 (J. Stucky concurring). The referenced case, *United States v. Stein*, does

[9] Administrative requests are tantamount to administrative subpoenas. In fact, the Department of Justice in a 2002 report indicates the terms are interchangeable. In a mandated Report to Congress the Department of Justice outlined the legal framework for administrative subpoenas, "[f]or purposes of this report, 'administrative subpoena' authority has been defined to include all powers, regardless of name, that Congress has granted to federal agencies to make an administrative or civil investigatory demand compelling document production or testimony." Report to Congress on the Use of Administrative Subpoena Authorities by Executive Branch Agencies and Entities, Pursuant to P.L. 106-544, Section 7 http://www.justice.gov/archive/olp/rpt_to_congress.htm (last visited Sep. 12, 2023). Since administrative requests are administrative subpoenas, Congress must specifically grant to an administrative agency authority to issue such subpoenas. See *Okla. Press Pub. Co. v. Walling*, 327 U.S. 186, 209, 66 S. Ct. 494, 505–06 (1946) (holding administrative agencies may issue administrative subpoenas without probable cause only if authorized by Congress). The Department of the Air Force has no authority to issue administrative subpoenas outside of those issued by Inspectors General. H.V.Z. contends even if prosecutors had authority to issue administrative requests, that authority is not a legal right.

suggest prosecutors have a "legal right" to the evidence so long as they can gain access to it through a legal process; nevertheless, it establishes that when the prosecution enters into an agreement that guarantees it will have "the unqualified right" to access "any documents it wishes for the purposes of [its] case," then the prosecution cannot in the same breath claim those documents are not under its "custody or control." *United States v. Stein*, 488 F. Supp. 2d 350, 363 (S.D.N.Y. 2007). In *Stein*, the prosecutors owned the right; they literally bargained for the right to have unfettered access to KPMG's documents through the DPA. *Id.* H

Stein is a very far cry from this case, where defense counsel is trying to pierce H.V.Z.'s H.I.P.A.A. protections without any real showing of relevance, necessity, the prosecutor's intent to use medical records in their case-in-chief, or even a proffer that non-privileged records exist within the M.T.F. Here, prosecutors do not have an "unqualified right" to access H.V.Z.'s records at the M.T.F., and certainly not "any documents [they] wish[]." In fact, the roles are reversed. It is H.V.Z.—not the prosecutors—who owns the right over her DoD Health Record, i.e. the right to keep the records private. Of course, in some circumstances prosecutors may be able to avail themselves of a legal process to pierce H.V.Z.'s legal right, but unlike in *Stein*, here prosecutors hold no actual rights to H.V.Z.'s records.

Finally, DoD regulations reflect the intent behind H.I.P.A.A.'s protections and

further support the interpretation that the administrative request is a process, not a legal right. The Defense Health Agency's policy prohibits an M.T.F. from disclosing an *entire* health record pursuant to an administrative request:

> Requests will be specific and limited in scope to the extent reasonably practicable given the purpose for which the information is sought. The M.T.F. or DTF may not disclose an entire health record, except when the entire record is specifically justified as the amount that is reasonably necessary to accomplish the purpose of the disclosure.

Defense Health Agency Procedures Manual 6025.02, Vol.1, *DoD Health Record Life Cycle Management, Volume 1: General Principles, Custody and Control, and Inpatient Records* at 39 (November 23, 2021).

Second, Prosecutors do not have a legal right to DoD Health Records because M.T.F.s are not "required by law" to comply with a prosecutor's administrative requests absent additional requirements. As a threshold matter, the proponent of H.I.P.A.A.'s Privacy Rule—and the ultimate arbiter of its exceptions—is the Department of Health and Human Services (HHS), not the Department of Defense. *See* DoDM 6025.18 at para. 3.2c(1) ("Rules and procedures established by the Secretary of HHS pursuant to the H.I.P.A.A. rules for covered entities and their business associates *are applicable through this Manual* to DoD covered entities and their business associates." Id. (emphasis added). This backdrop is essential to any meaningful analysis into the scope and

limitations of "administrative requests."

Generally, in a law enforcement context, crime victims must consent to disclosure of their protected health information (PHI), "except for disclosures *required by law.*" 45 C.F.R. § 164.512(f)(3). In certain circumstances "an administrative request" may fit that bill. 45 C.F.R. § 164.512(f)(3). However, a response to an administrative request in not always "required by law." *See* 45 C.F.R. § 164.514(h)(2)(i)(A) (suggesting the appropriate way to go approach an administrative request is through "administrative subpoena or similar process"). In fact, earlier this year the HHS squarely addressed the limitations of "administrative requests," emphasizing:

> The examples of administrative requests provided in the existing regulatory text include only those requests that are enforceable in a court of law, and the catchall "or similar process authorized by law" similarly is intended to include ***only requests that, by law, require a response***. This interpretation is consistent with the Privacy Rule's definition of "required by law," which enumerates these and other examples of administrative requests that constitute "a mandate contained in law that compels an entity to make a use or disclosure of protected health information and that is enforceable in a court of law." However, the Department has become aware that some regulated entities may be interpreting this provision in a manner that is inconsistent with the Department's intent. Therefore, the Department is taking this opportunity to clarify the types of administrative processes that this provision was intended to address.

H.I.P.A.A. Privacy Rule To Support Reproductive Health Care Privacy: A Proposed

Rule by the Health and Human Services Department on 04/17/2023, 88 FR 23506 (April 17, 2023) (emphasis added). HHS went on to propose the following change to 45 C.F.R. § 164.512(f)(1), proposing not just a future change in the intent, but reflecting the original intent of H.I.P.A.A.:

> Specifically, the Department proposes to insert language to clarify that the administrative processes that give rise to a permitted disclosure include only those that, by law, require a regulated entity to respond. Accordingly, the proposal would specify that PHI may be disclosed pursuant to an administrative request "for which a response is required by law." *This is not intended to be a substantive change, as the proposal is consistent with preamble discussion on this topic in the 2000 Privacy Rule*.

45 C.F.R. § 164.514

HHS's language reflects the congressional and regulatory intent that administrative requests may be made when there is an additional reason where production is "required by law." Additionally clarifying, the C.F.R. explains "required by law" means a mandate that compels an entity to make a use or disclosure of [PHI] and that is enforceable in a court of law.

> Required by law includes, but is not limited to, court orders and court-ordered warrants; subpoenas or summons issued by a court, grand jury, a governmental or tribal inspector general, or an administrative body authorized to require the production of information; a civil or an authorized investigative demand; [. . .] and statutes or regulations that require the production of information,

45 C.F.R. § 164.103.

Guiding laws and regulations include DoD regulations which state DoD Health Records "are protected by the H.I.P.A.A. Privacy, Breach Notification, and Enforcement Rules." DoDI 6040.45, *DoD Health Record Life Cycle Management* at 2 (April 11, 2017); H.I.P.A.A.. It further states these records are government records, emphasizing the need to comply with other statutes and regulations in protecting those records, stating "[b]efore using and disclosing [Protected Health Information (PHI)], [M.T.F.s] need to comply with the provisions in both the Privacy Act […] and H.I.P.A.A.." *Id*. at 1, 30. Moreover, such "records will not be released to any person or agency outside the M.T.F. or D.T.F., except in compliance with a *valid court order* or as otherwise *required by law*." *Id*. at 31 (emphasis added). Even then, "M.T.F. personnel will not release information from DoD Health Records if such disclosure would result in a clearly unwarranted invasion of privacy." *Id*. at 29.

Taken together, the DoD's regulations, H.I.P.A.A. and its intent, plus HHS's regulations and interpretation, all demonstrate an administrative request does not alone constitute a legal right. Rather, a legal right must exist separately. Furthermore, 45 C.F.R. § 164.512 leaves discretion to the covered entity to refuse disclosure even when the request is authorized by law, as it ***may*** release. Trial counsel cannot have a legal right to PHI when access relies on the covered entity's

discretion.

In summary, the administrative request provision in the DoDM 6025.18 does not constitute "required by law" as explained by the C.F.R. Read this way, trial counsel's administrative request constitutes the process described in *Crump*, not a legal right outlined in *Stellato*.

c. Applying R.C.M. 701(a)(2) to DOD Health Records housed at an M.T.F. leads to an absurd result.

Finding military authorities were in possession, custody, or control of H.V.Z.'s DoD Health Records leads to an "absurd result." *See King*, 71 M.J. at 52. In addition to the inherent textual, precedential, and interloping privacy statute problems with the Military Judge's holding, there is a simpler explanation for why military authorities do not have control over medical records in at the M.T.F.: any contrary holding would mean victims seen at an M.T.F. have fewer rights than victims treated off base.[10]

[10] This is even more concerning when almost all victims of sexual assault in the military justice system are active-duty servicemembers required to obtain healthcare in the MHS. Table 7 of FY 2022 Statistical Data on Sexual Assault accompanying the DoD Annual Report on Sexual Assault in the Military indicates that approximately 82% of victims in completed investigations of unrestricted reports were servicemembers. https://www.sapr.mil/sites/ default/files /public/docs/reports/AR/FY22/Appendix_B_Statistical_Data _on_Sexual_Assault_FY2022.pdf (last accessed June 13, 2023 at 1936). In Appendix G of the reports capturing Domestic Abuse-Related Sexual Assault, of the 467 victims, 89% were family member beneficiaries or servicemembers. https://www.sapr.mil/sites/default /files /public/docs/reports/ AR/FY22/Appendix_G_Domestic_Abuse_Related_Sexual_Assault_FY2022.pdf

In its decision in *H.V.Z.*, the A.F.C.C.A. agreed that victims have a "constitutional privacy interest in [their] medical records managed by the [M.T.F.]."[11] *In re H.V.Z.*, at *14. Yet, enigmatically, the A.F.C.C.A. also eviscerated H.V.Z.'s right to *any* process—let alone *due* process guaranteed by the constitution—to seek relief when those constitutional interests are implicated. Thus, whether victims like H.V.Z. can assert their constitutional right to privacy in their medical records would depend entirely on where they sought treatment, i.e. some victims would enjoy the protections of R.C.M. 703(g)(3)(C)(ii) simply because they have never been treated in the MHS while others have no rights under to protect their phi simply because they were seen at the M.T.F..

As stated above, it is also absurd considering R.C.M. 703(g)(3)(C)(ii), which clearly contemplates a formal process for trial counsel to procure medical records. As if it were not clear already, on 23 July 2023, the President issued an Executive Order amending the R.C.M.s clarifying the victim's right to object and move to quash subpoenas for personal or confidential information via R.C.M. 703(g)(3)(G). 2023 Amendments to the Manual for Courts Martial, United States, 88 Fed. Reg. 50, 551 (Aug. 12, 2023). Specifically, the Order states:

> . . . a victim named in a specification whose personal and confidential information has been subpoenaed under subparagraph (g)(3)(C)(ii) requests relief on grounds that

[11] H.V.Z. asserts this Court should hold the same.

> compliance is unreasonable, oppressive, or prohibited by law, the military judge [. . .] shall— (i) order that the subpoena be modified or quashed, as appropriate, or (ii) order the person to comply with the subpoena.

Again, in the Discussion section of the rule, the first example of the type of "personal and confidential information" that might fit this bill is: a victim's medical records. R.C.M. 703(g)(3)(C)(ii) *Discussion* (2019 M.C.M.). It is simply unreasonable for the Military Judge to find that the President prescribed these clear protections for victims in the context of a *military* court-martial, but then failed to mention that these protections would avail them nothing in the place where virtually all *military* medical records are stored—the M.T.F. This is what *King* meant when it warned against an interpretation that "leads to an absurd result." *King*, 71 M.J. at 52.

II. THE MILITARY JUDGE ERRED WHEN HE DID NOT CONSIDER H.V.Z.'S WRITTEN OBJECTION TO PRODUCTION OF HER DOD HEALTH RECORD AS HE FOUND SHE DID NOT HAVE STANDING NOR A RIGHT TO BE HEARD

The Military Judge erred in denying standing to H.V.Z. to motion the court and be heard[12] on matters related to the production of her personal records.

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[12] The right to be heard includes the right to be heard *through counsel*. *LRM v. Kastenberg*, 72 M.J. at 370 ["A reasonable opportunity to be heard at a hearing includes the right to present facts and legal argument, and that a victim or patient who is represented by counsel be heard through counsel."].

R.C.M. 703(g)(3)(G) gives a victim opportunity to move the trial court for appropriate relief. Even if R.C.M. 703(g)(3)(G) does not apply, the C.V.R.A., Article 6b of the U.C.M.J. and the Congressional intent behind these actions provide H.V.Z. the opportunity to be heard before turning over her medical records to her alleged abuser. Finally, traditional standing doctrine, including cases by C.A.A.F., require the opportunity for H.V.Z. to be heard through counsel on legal issues related to her records.

a. R.C.M. 703(g)(3) applies to the H.V.Z.'s medical records sought by the Court, giving H.V.Z. standing to address the trial court and object to the production of her records.

R.C.M. 703 describes production of witnesses and evidence, referencing the "compulsory process" that is to be used when needed. R.C.M. 703(e)(2). In explaining the compulsory process using investigative subpoenas, the rule reflects intent for a "victim named in a specification" to have standing to motion the trial court for appropriate relief. R.C.M. 703(g)(3)(C) and 703(g)(3)(G). This rule states the named victim "must be given notice so that the victim can move for relief under subparagraph (g)(3)(G) or otherwise object." R.C.M. 703(g)(3)(C). R.C.M. R.C.M. 703(g)(3)(G) further provides options for a military judge if a named victim has had confidential information subpoenaed "*and requests relief*." R.C.M. 703(g)(3)(G) (emphasis added).

Here, The Military Judge refused to consider H.V.Z.'s written objection to

compelling nearly twenty years of her medical records—records within the scope of R.C.M. 703 because they are personal and confidential information about a victim requiring a subpoena to produce. The Military Judge ruled, "[t]his court received this response but did not consider it due to lack of standing before this trial court. *See In re HK*, 2021 CCA LEXIS 535 (A.F.C.C.A. 2021). Additionally, the court's ruling does not implicate R.C.M. 703(g)(3)(C), and as such, does not provide the named victim standing under the provisions of this rule." Attachment I to Cert. at 113. The Military Judge's dismissal of R.C.M. 703 was improper[13], and the plain language of R.C.M. 703 reflects the intended obligation to allow a victim to object and be heard on personal and confidential information subject to a subpoena.

b. Fairness and due process, as intended by Congress, require victims the right to be heard on matters of privacy.

Art 6b(a)(9) directly incorporated provisions from the already existing C.V.R.A. *See* National Defense Authorization Act for Fiscal Year 2014, § 1701(b)(2), 113 P.L. 66 (2013) (hereinafter 2014 NDAA); *see also* 18 U.S.C. § 3771. Accordingly, Congressional intent of the C.V.R.A. directly applies to the intent behind language in Art 6b. During the 2004 Congressional session when

[13] Argued below, the Military Judge, instead composed a unique, unauthorized process of issuing a court order to circumvent to approved method of ordering TC to issue a subpoena.

explaining the C.V.R.A. and addressing the right to fairness contained therein, co-sponsor of the act, Arizona Senator Jon Kyl, explained the word choice:

> [F]airness includes the notion of due process. Too often victims of crime experience a secondary victimization at the hands of the criminal justice system. This provision is intended to direct government agencies and employees, whether they are in executive or judicial branches, to treat victims of crime with the respect they deserve and to afford them due process.

150 Cong. Rec. S10911 (daily ed. Oct. 9, 2004). The intent of C.V.R.A. and Article 6b rights remains the same: the right to be treated with fairness and with respect reflects a requirement to afford victims' due process.

Due process includes allowing victims the appropriate forum to address the court on the release of their protected information to their alleged abuser. Doing so satisfies the intent of Congress in affording due process and acknowledging their legal stake in protecting their own health record, furthermore recognizing the protections afforded by additional statutes, *e.g*. H.I.P.A.A.,. Failing to acknowledge H.V.Z.'s equities willfully disregards the most recent executive amendments stating "[t]he military operates a modern criminal justice system that ***recognizes and protects the rights of both the victims of alleged offenses and those accused of offenses***." 2023 Amendments to the Manual for Courts Martial, United States, 88 Fed. Reg. 50,597 (Aug. 22, 2023). Refusing to accept H.V.Z.'s legal stake in the production of her DoD Health Record ignores the reality

wherein ". . . Congress has changed the traditional paradigm by providing the victims of the accused's crimes with limited authority to participate in the proceedings." *United States v. Harrington*, 2023 C.A.A.F. LEXIS 577 (C.A.A.F. 2023).

c. Congress intended the Military Judge give H.V.Z. a meaningful opportunity to object to the production of her DoD Health Record.

In 2021, the A.F.C.C.A. issued an opinion in *In re HK*[14], wherein it relied on the fact that the "C.V.R.A. —unlike Article 6b, U.C.M.J.—explicitly calls for alleged violations of victims' rights to be raised before, and decided by, the district court in which the defendant is being prosecuted. 18 U.S.C. § 3771(d)(3). Upon an adverse ruling, a victim to whom the C.V.R.A. applies may then seek a writ of mandamus from the relevant court of appeals." 2021 CCA LEXIS 535 at *8 (A.F.C.C.A. 2021). The A.F.C.C.A. proceeded, "[i]f Congress did in fact use the C.V.R.A. as a template in crafting Article 6b, U.C.M.J., the absence of the latter of a requirement for the trial court to first hear matters of alleged victim right violations tells us Congress likely considered—and rejected—applying the C.V.R.A.'s trial level enforcement mechanism to the military." *Id.*, at *8-9. The A.F.C.C.A. went on in *In re VM* to state, "Article 6b, U.C.M.J., delineates eight [sic]

[14] C.A.A.F. summarily denied relief to HK when she filed a writ-appeal. With issuance of *MW*, the denial seems to have been for lack of jurisdiction rather than an affirmation of the A.F.C.C.A. opinion.

victim rights, and only one of those rights—Article 6b(a)(4)—specifically provides for an opportunity to be heard. As such, Petitioner does not have a statutory right to be heard on the rights she has asserted in this petition—to proceedings free from unreasonable delay and to be treated with fairness under Articles 6b(a)(7) and (8) [sic], U.C.M.J. Petitioner does not assert a non-statutory right to be heard." 2023 CCA LEXIS 290, at *7-8 (A.F.C.C.A. 2023).

This interpretation ignores the context in which Article 6b and the C.V.R.A. were enacted, their purpose, and the specifically stated intent of Congress in enacting Article 6b and the C.V.R.A. Senator Kyl described the need to afford victims with the right to be treated with fairness, "[i]t is ***not the intent of this bill that its significance be whittled down or marginalized by the courts or the executive branch***. This legislation is meant to correct, not continue, the legacy of the poor treatment of crime victims in the criminal process." *Supra*, Statement of Sen. Kyl. It is doubtful Congress intended rulings of its Article I Courts to whittle down H.V.Z.'s rights to be treated with fairness and with respect for her privacy. In this case, the Military Judge not only whittled down the right but rendered it nonexistent by refusing to acknowledge H.V.Z. has even the opportunity to protect those rights.

Interpreting Article 6b to suggest Congress only intended for victims' first opportunity to exercise and seek redress for violations of their rights is in filing a

writ petition to the Courts of Criminal Appeals ignores the implementing instructions contained within the 2014 NDAA. See 2014 NDAA § 1701(b)(2). The 2014 NDAA directed the Secretary of Defense to promulgate implementing instructions to effectuate Article 6b—in its prescription for minimum requirements for such policy the NDAA states, ". . . [t]he recommendations and regulations required . . . shall include the following . . . [m]echanisms for ensuring that members of the Armed Forces. . . make their best efforts to ensure that victims are notified of, and accorded, the rights specified in [Article 6b]." *Id.*

d. Additional standing doctrine supports H.V.Z.'s right to address the court and object to the production of her DoD Health Record.

"[. . . S]ufficient to establish standing, a plaintiff must show (i) that he suffered an injury in fact that is concrete, particularized, and actual or imminent; (ii) that the injury was likely caused by the defendant; and (iii) that the injury would likely be redressed by judicial relief." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021), quoting *Lujan v. Defenders of Wildlife*, 504 U. S. 555, 560-561 (1992). Non-parties to a court-martial may have standing. *See Kastenberg*. C.A.A.F. has a history allowing those who hold a privilege to contest and protect that privilege. *Id*. at 368.

Here, production of the entirety of H.V.Z.'s DoD Health Record without a showing of relevance and necessity injures H.V.Z. and is an unreasonable invasion

of her privacy at the behest of Government. The court can remedy the injury by preventing the production of the record. Because H.V.Z. has met the three elements of standing, H.V.Z. has standing to address the court on this issue.

These records may or may not include privileged information. H.V.Z. as the holder of the privilege could contest and protect the privilege. Even for the non-privileged information, H.V.Z. has access to the information court participants do not and could grant access to the records. The records, shielded by another statute—H.I.P.A.A.—allows H.V.Z. access. Just as the holder of the privilege can contest and protect the privilege in court, the holder of access may protect the privilege in trial court. Because she holds access to this information, whether privileged or not, she has standing to address the court related to these records.

Trial court is the appropriate place to contest disclosure, as the trial court orders the production of the records and H.V.Z. has the right to be heard. A victim or patient under M.R.E. 412 or M.R.E. 513 may address the trial court and be heard through counsel to contest the release of private information in a court-martial. Requiring the victim or patient to address the issue only in an appellate court contradicts both the history military courts have had in allowing participants address the court, the plain language of the R.C.M. and M.R.E.s, and fairness as intended by Congress. Therefore, H.V.Z. rightfully and legitimately submitted a written objection seeking relief from the Military Judge and the

Military Judge must account for her legal rights.

To the extent the statutory and Constitutional provision of rights to H.V.Z. wherein Congress "changed the traditional paradigm" to account for and afford those rights to H.V.Z. does not confer her standing, H.V.Z. still has standing. As Judge Ryan stated in her dissent in *Kastenberg*, "[w]hile we are assuredly not an Article III court, we have, up until now, understood ourselves to be bound by the requirement that we act only when deciding a "case" or "controversy."" 72 M.J. at 373. Importantly, this Court decided *Kastenberg* prior to the codification of crime victims' rights in Article 6b—clearly placing the C.V.R.A. into the military justice realm—and the issue was whether, in the absence of a specific grant of jurisdiction and a specific assignment of a "controversy", L.R.M. could advocate for her privilege through her assigned counsel. The codification of rights should negate the need for such an analysis. Nevertheless, despite the provision of statutory rights to crime victims, if victims need demonstrate standing to object or motion a courts-martial to advocate for and to uphold their rights, H.V.Z. has such standing.

III. AS ARTICLE 6b IS ANALAGOUS TO THE CRIME VICTIMS' RIGHTS ACT AND THE ALL WRITS ACT IS INAPPLICABLE TO VICTIMS' WRIT PETITIONS FILED PURSUANT TO ARTICLE 6b ORDINARY STANDARDS OF APPELLATE REVIEW SHOULD APPLY

To enforce H.V.Z.'s rights, the A.F.C.C.A. determined that "[i]n order [for

H.V.Z.] to prevail on a petition for a writ of mandamus, the petitioner must show that: (1) there is no other adequate means to attain relief; (2) the right to issuance of the writ is clear and indisputable; and (3) the issuance of the writ is appropriate under the circumstances." *H.V.Z.*, 2023 CCA LEXIS 292, at *4-5; *citing Hasan v. Gross*, 71 M.J. 416, 418 (C.A.A.F. 2012)(internal quotations omitted). The A.F.C.C.A. went on to declare, "[a] writ of mandamus is a drastic instrument which should be invoked only in truly extraordinary situations." *Id.* citing *Howell v. United States*, 75 M.J. 386, 390 (C.A.A.F. 2016) (internal quotations omitted).

The A.F.C.C.A. erred in relying on *Howell* as the facts in that case make it easily distinguishable and incomparable to *H.V.Z. See generally Howell; see also H.V.Z. Howell* is a case brought under the All Writs Act. 75 M.J. at 390 (stating "[i]n the context of this case, writ jurisdiction under the All Writs Act is limited to those matters that are "in aid of [the Court of Criminal Appeals] respective jurisdiction[]"). In *Howell*, as the petitioner was seeking an *extraordinary* action under the All Writs Act, the C.A.A.F. states "mandamus, is a drastic instrument which should be invoked only in truly extraordinary situations." *Id.* (internal quotations and citations omitted). Article 6b(e)(1) allows, "if [H.V.Z.] believes that . . . a court-martial ruling violates [her] rights afforded by a section (article) or rule specified in paragraph (4), the victim may petition the Court of Criminal Appeals for a writ of mandamus to require . . . the court-martial to comply with

the section (article) or rule." H.V.Z. need not show issuance of a writ is in aid of any preexisting jurisdiction because the ". . . text of Article 6b(e)(1), (2), and (3)(A), U.C.M.J., grants jurisdiction to the CCAs by providing that 'the victim may petition the Court of Criminal Appeals for a writ of mandamus,' and that a 'petition for a writ of mandamus described in this subsection shall be forwarded directly to the Court of Criminal Appeals'." *M.W. v. Unites States and Robinson*, 2023 C.A.A.F. LEXIS 472 at *8; quoting Article 6b. Thus, specific, independent jurisdiction in Article 6b(e) exists for H.V.Z. to seek relief divorced from any other provision of law. Article 6b(e), however, contains no explicit standard of review necessitating the Court determine what standard of review should apply. The A.F.C.C.A. adopts the standard from the All Writs Act—this is error, and the ordinary standard of appellate review should apply for writ to issue pursuant to Article 6b(e) consistent with the standard to issue writs under the C.V.R.A. *See* 18 U.S.C. § 3771(d)(3). On issues of law contained in writ petitions filed pursuant to Article 6b(e) the appellate courts should utilize *de novo* review.

"For some few trial court determinations, the question of what is the standard of appellate review is answered by relatively explicit statutory command. [. . .] For most others, the answer is provided by a long history of appellate practice. But when, as here, the trial court determination is one for which neither a clear statutory prescription nor a historical tradition exists, it is

uncommonly difficult to derive from the pattern of appellate review of other questions an analytical framework that will yield the correct answer." *Pierce v. Underwood*, 487 U.S. 552, 558 (1988) (determining the standard of review for the Equal Access to Justice Act is abuse of discretion although the statute does not explicitly command a standard). H.V.Z. asserts no clear statutory prescription exists to determine the standard of review for writ to issue under Article 6b(e), but historical tradition can be distilled from the analogous C.V.R.A.. *See* 18 U.S.C. § 3771. Requiring a heightened standard of review places H.V.Z. at a disadvantage to garner enforcement of her rights just because the accused is prosecuted at a court-martial vice a civilian jurisdiction—this is unfair.

The A.F.C.C.A. held in *In re KK*,

> . . . in November 2015, Congress amended Article 6b, U.C.M.J., to add an enforcement mechanism, granting victims the ability to petition a Court of Criminal Appeals for a writ of mandamus in the event of an alleged violation of any of the eight rights set out in the act, as well as for alleged violations of Mil. R. Evid. 412 and Mil. R. Evid. 513. Unlike the C.V.R.A. provision, the Article 6b, U.C.M.J., provision does not contemplate a petitioner first raising the matter to trial court. Also absent from Article 6b, U.C.M.J., is any indication that 'ordinary standards of appellate review' were intended to supplant the traditional extraordinary relief standard. The fact this language was not included in the Article 6b, U.C.M.J., amendments just months after it was added to the C.V.R.A. is an indication Congress has provided different standards of review for mandamus petitions brought under the two laws.

2023 CCA LEXIS 31, at *9 (A.F.C.C.A. 2023). The A.F.C.C.A.'s analysis does not adhere to the Supreme Court guidance in *Pierce* to look to historical tradition, and instead fabricates the principal that Congress should have inserted a specific a standard of review into the statute. *See Pierce* at 558. Congress provided no explicit command in Article 6b(e); A.F.C.C.A. erred by failing to consider historical context and instead looking to the standard of review for the common-law extraordinary writ of mandamus in lieu of the equivalent writ of mandamus provided for in the C.V.R.A. *See Id.* The writ of mandamus in Article 6b(e) is commensurable to the C.V.R.A.—not to writs allowed to issue under the All Writs Act, and it is the context of the C.V.R.A. that matters. C.A.A.F. affirms this in *MW,* stating, "[. . .] the All Writs Act could not provide this Court jurisdiction to grant a victim a writ of mandamus if Article 6b, U.C.M.J., did not provide us jurisdiction." *M.W. v. United States*, 2023 C.A.A.F. LEXIS 472, 15 (C.A.A.F. 2023). In other words, A.F.C.C.A. defaulted to a standard of review obsolete to crime victims instead of analyzing Article 6b(e) as, ". . . a unique grant of statutory authority. . ." without an explicit standard of review. *Randolph v. HV*, 76 M.J. 27, 31 (C.A.A.F. 2017). In *KK,* A.F.C.C.A. states, "Congress has specified that a victim may seek a 'writ of mandamus' from the Courts of Criminal Appeals under Article 6b(e), U.C.M.J. Giving effect to the plain meaning of the words of the statute and the longstanding standard for a petitioner to secure mandamus

relief, we conclude Petitioner bears the burden to meet the ***traditional mandamus standard*** as set out in *Hasan*, and not the abuse of discretion standard which Petitioner encourages us to adopt." *KK* at *10 (emphasis added). Yet, the writ of mandamus authorized to issue in Article 6b(e) is unique and divorced from the traditional mandamus.

The C.V.R.A. requires Federal Courts of Appeals to "apply ordinary standards of appellate review." 18 U.S.C. § 3771(d)(3). Before this explicit requirement added in 2015, the C.V.R.A. omitted any clear statement on the appropriate standard, causing a circuit split. The Second Circuit determined in 2005, just a year after the passage of the C.V.R.A.,

> Under the plain language of the C.V.R.A., however, Congress has chosen a petition for mandamus as a mechanism by which a crime victim may appeal a district court's decision denying relief sought under the provisions of the C.V.R.A. [. . .] It is clear, therefore, that a petitioner seeking relief pursuant to the mandamus provision set forth in [the C.V.R.A.] need not overcome the hurdles typically faced by a petitioner seeking review of a district court determination through a writ of mandamus.

United States v. Rigas (*In re W.R. Huff Asset Mgmt. Co.*), 409 F.3d 555, 562 (2d Cir. 2005) (internal citations and quotations omitted). The Ninth Circuit later held, "[t]he C.V.R.A. creates a unique regime that does, in fact, contemplate routine interlocutory review of district court decisions denying rights asserted under the statute. We thus [. . .] must issue the writ whenever we find that the district court's

order reflects an abuse of discretion or legal error." *Kenna v. United States Dist. Court*, 435 F.3d 1011, 1017; *see also In re Stewart*, 552 F.3d 1285, 1288-89 (11th Cir. 2008) (issuing a writ of mandamus pursuant to the C.V.R.A. without demanding a showing of clear and indisputable grounds for relief).

Compare the Second, Ninth, and Eleventh Circuits with the holdings requiring traditional mandamus standard of review like the Tenth Circuit holding, "[i]n light of the fact that Congress regularly provides for and delineates the nature and scope of ordinary interlocutory appellate review, we see no reason to suppose that the use of the word mandamus in the C.V.R.A. has other than its traditional meaning." *In re Antrobus*, 519 F.3d 1123, 1129 (10th Cir. 2008). *See In re Acker, 5*96 F.3d 370, 372 (6th Cir. 2010)*; In re Dean,* 527 F.3d 391, 394 (5th Cir. 2008) (adopting the Tenth Circuit's analysis in *In re Antrobus*). The DC Circuit Court in 2011 adopts the traditional mandamus standard for petitions brought under the C.V.R.A. stating, ". . . there is no indication that Congress intended to invoke any other standard [than traditional mandamus standard.]" *United States v. Monzel*, 641 F.3d 528, 533 (D.C. Cir. 2011).

Nevertheless, Congress acted in 2015 and amended the C.V.R.A. to make its intentions clear after Senator Diane Feinstein introduced a Bill demanding ordinary standards of appellate review. *See* Justice for Victims of Trafficking Act of 2015, 114 P.L. 22, § 113, 129 Stat. 227, (2015). In introducing the Bill, Senator Feinstein

stated,

> The bill would also ensure that crime victims have access to appellate review when their rights are denied in the lower court. Regrettably, five appellate courts have misapplied the Crime Victims' Rights Act by imposing an especially high standard for reviewing appeals by victims, requiring them to show 'clear and indisputable error'. Four other circuits have applied the correct standard: the ordinary appellate standard of legal error or abuse of discretion. This bill resolves the issue,[. . .] the appellate court 'shall apply ordinary standards of appellate review'.

160 Cong. Rec. S6154 (daily ed. Nov. 19, 2014)(statement of Sen. Feinstein). The Congressional Report accompanying The Justice for Victims of Trafficking Act of 2015 states,

> This section ***clarifies Congress' intent*** with regard to several important provisions of the Crime Victims' Rights Act (C.V.R.A.), enacted in 2004, and makes several technical and conforming changes to the C.V.R.A.. [. . .] The C.V.R.A. also empowers crime victims to challenge the denial of their rights through a writ of mandamus [. . .] ***despite the use of a writ of mandamus as a mechanism for victims' rights enforcement, Congress intended that such writs be reviewed under ordinary appellate review standards.***

H.R. Rep. No. 114-7, at 7-8 (2015)(emphasis added). C.A.A.F. just declared in *United States v. Harrington* ". . . recently, Congress has changed the traditional paradigm [criminal trials were an adversarial proceeding between two opposing parties] by providing the victims of the accused's crimes with limited authority to participate in the proceedings. *See, e.g.*, Crime Victims' Rights Act, 18 U.S.C. § 3771

(2018) (establishing the rights of crime victims in federal courts); Article 6b, U.C.M.J., 10 U.S.C. § 806b (2018) (establishing the rights of crime victims in the military justice system)." *Harrington* at *20 (citations intentionally remain). In short, C.A.A.F. analogizes the C.V.R.A. and Article 6b. Yet, the A.F.C.C.A. found the failure of Congress to add similar language on standard of review to Article 6b(e), ". . . is an indication Congress has provided different standards of review for mandamus petitions brought under the two laws." *KK* at *9-10. Analyzing omission of a standard of review in Article 6b(e) to default to a standard more onerous than the civilian courts leads to an absurd result; moreover, the A.F.C.C.A. analysis compares Article 6b(e) to the All Writs Act and not to its more appropriate counterpart the C.V.R.A..

"To be sure, the inquiry into the appropriate standard of review cannot be resolved by a head-counting exercise. But the long history of appellate practice here carries significant persuasive weight." *McLane Co. v. EEOC*, 581 U.S. 72, 80-81, (2017) (internal citations and quotations omitted) (addressing the standard of review to quash administrative subpoenas issued by the EEOC wherein the statute does not provide the standard). The history of appellate practice for issuance of writs of mandamus under the C.V.R.A. should carry persuasive weight, as Article 6b(e) and the All Writs Act are incomparable. There is no basis to infer Congress intended to "impos[e] an especially high standard for reviewing

appeals" for victims of military offenders that it seeks to spare the victims of civilian offenders. 160 Cong. Rec. S6154, Sen. Feinstein. C.A.A.F. held in both *Randolph* and recently in *MW* that the All Writs Act is inapplicable to victims' petitions to enforce their rights under Article 6b(e); thus, the standard of review and jurisprudence derived from the All Writs Act are also irrelevant.

H.V.Z. need only show the military judge abused his discretion or made a legal error for writ to issue. In this case, the Military Judge did both.

IV. THIS COURT SHOULD ISSUE A WRIT OF MANDAMUS ESTABLISHISH H.V.Z.'S STANDING TO OBJECT TO PRODUCTION OF HER PHI AND VACATING THE MILITARY JUDGE'S RULING AND ORDER.

TJAG certified C.A.A.F. review of H.V.Z.'s petition for issuance of a writ of mandamus filed under Article 6b(e) to enforce her rights provided therein. The Military Judge abused his discretion and committed legal error concluding H.V.Z.'s DoD Health Record was in the possession, custody, or control of military authorities. He then conceived a novel system of court orders to evade using the subpoena process. This unreasonably invades H.V.Z.'s privacy interests in those records as the Military Judge refused to consider objection by H.V.Z. or provide any due process to the H.V.Z.

a. <u>The Military Judge exceeded his authority issuing a Court Order to the 56th Medical Group.</u>

Military Judges do not possess the authority to issue a court order to compel

production as no statutory authority exists for such an issuance outside the subpoena process. In the case in interest, the Military Judge devised an unsanctioned discovery and production process to evade using the subpoena process as required by law and R.C.M. 703(g)(3). Article 46 states, "(a) Opportunity to obtain witnesses and other evidence. In a case referred for trial by court-martial, the trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence ***in accordance with such regulations as the President may prescribe.***" (emphasis added). In other words, the authority of the Military Judge to "obtain [] other evidence" must derive from a Rule of Court-Martial. R.C.M.s 701-703 implement Article 46.[15]

As it stands, the only personnel authorized to issue subpoenas are: "[. . .] (ii) the trial counsel of a general or special court-martial; [. . .] (v) in the case of a pre-referral investigative subpoena, a military judge [. . .]" R.C.M 703(g)(3)(D) (2023 M.C.M.). R.C.M. 703 vests subpoena authority in trial counsel and not Military Judges. The absence of authority for the Military Judge to issue a subpoena directing 56th Medical Group is not an oversight to be cured by inventing authority to issue a court order. The amendments to R.C.M. 703 effective on 27 December 2023 highlight that Military Judges currently lack the authority to issue

[15] A military accused also has the right to obtain favorable evidence under Article 46, U.C.M.J., 10 U.S.C. § 846 (2006),1 as [*187] implemented by R.C.M. 701-703. *United States v. Coleman*, 72 M.J. 184, 186-87 (C.A.A.F. 2013)

a subpoena.[16] Inventing a court order to demand 56th Medical Group produce, redact, and analyze H.V.Z.'s DoD Health Record to circumvent the subpoena process—unquestionably vesting H.V.Z. with the right to move to quash such a subpoena—is clear and indisputable error. Moreover, it is some form of judicial gymnastics that treats H.V.Z. unfairly and without regard for her rights to privacy and due process. As the court order is without authority to issue, it should be vacated.

b. <u>H.V.Z. has grounds to quash any subpoena issued.</u>

It was legal error to determine that the Defense's request for H.V.Z.'s DoD Health Record did not "implicate R.C.M. 703(g)(3)(C)" and the 56th MDG is a "military authority." Under R.C.M. 703(g)(3)(G) H.V.Z. could move to object to the issuance of a subpoena " . . . grounds that compliance is unreasonable, oppressive, or prohibited by law." (2023 Manual for Courts-Martial). In defining what is unreasonable, oppressive, or prohibited by law the Supreme Court says,

> A subpoena for documents may be quashed if their production would be "unreasonable or oppressive," but not otherwise. The leading case in this Court interpreting this standard is *Bowman Dairy Co. v. United States*. This case recognized certain fundamental characteristics of the subpoena duces tecum in criminal cases: (1) it was not intended to provide a means of discovery for criminal cases, (2) its chief innovation was to expedite the trial by

[16] R.C.M. 703(g)(3)(E) will state "who may issue [subpoenas] (i) the military judge, after referral" 88 Fed. Reg. 50,663

> providing a time and place before trial for the inspection of subpoenaed materials[. . .]cases decided in the wake of *Bowman* have generally followed Judge Weinfeld's formulation in *United States v. Iozia*, as to the required showing. Under this test, in order to require production prior to trial, the moving party must show: (1) that the documents are evidentiary and relevant; (2) that they are not otherwise procurable reasonably in advance of trial by exercise of due diligence; (3) that the party cannot properly prepare for trial without such production and inspection in advance of trial and that the failure to obtain such inspection may tend unreasonably to delay the trial; and (4) that the application is made in good faith and is not intended as a general "fishing expedition."

United States v. Nixon, 418 U.S. 683, 698-700 (1974) (internal citations omitted). In short, under R.C.M. 703(g)(3)(G) H.V.Z. can object to production asserting her DoD Health Record is irrelevant, unnecessary, and the request is tantamount to a "fishing expedition." *Id.*

Nixon goes on to declare, "[g]enerally, the need for evidence to impeach witnesses is insufficient to require its production in advance of trial." *Id.* at 701. Many Federal Circuit Courts elaborate that the basis to issue a subpoena cannot only be supported by a desire to uncover impeachment material: "[t]he only evidentiary use that defendants have been able to advance is that the statements and transcribed interviews of witnesses could be used for impeachment purposes. This use is generally insufficient to justify the pretrial production of documents." *United States v. Fields*, 663 F.2d 880 (9th Cir. 1981); see generally *United States v.*

Cuthbertson, 630 F.2d 139 (3d Cir. 1980); see also *United States v. Hughes*, 895 F.2d 1135 (6th Cir. 1990). H.V.Z. acknowledges discovery in the military justice system is more robust and open than in the civilian system, and the disclosure of and production of information as to witnesses does not only emerge after testimony occurs like in the federal civilian criminal system. However, as to subpoenas, Article 46 states, "(b) Subpoena and other process generally. Any subpoena or other process issued under this section (article)—(1) ***shall be similar to that which courts of the United States having criminal jurisdiction may issue***." Article 46(b)(1)(emphasis added). Courts of the United States having criminal jurisdiction require more than a proffer that the documents to be produced may contain impeachment material. In the case in interest, the Defense's Motion to Compel asserts a need to look at H.V.Z.'s records because, "[r]eview of these records is relevant to ***assess whether*** there are any existing conditions, prescriptions, or other medical statuses that would impact the complaining witness' ability to remember or perception, and general credibility." Attachment I to Cert. at 51. The Defense goes on to argue, "[i]t is relevant for Defense preparation ***to evaluate whether*** [H.V.Z.]. had any appointments surrounding the dates of alleged charged and uncharged misconduct and offered responses to mood questions . . ." *Id*. The Defense motion does not attempt to offer a proffer of relevance and necessity as it relays, "[t]he Defense is requesting

the disclosure of nonprivileged mattesr [sic] (Mellette matters) found within mental health records of the complaining witness, and ***within the Government's possession***." *Id*. at 52.

The limitations wherein Courts disfavor issuance of a subpoena for only impeachment material is supported by the truism, "[t]he ability to question adverse witnesses, however, does not include the power to require the pretrial disclosure of any and all information that might be useful in contradicting unfavorable testimony." *Pennsylvania v. Ritchie*, 480 U.S. 39, 53 (1987)(plurality opinion). The Supreme Court continues, "[n]ormally the right to confront one's accusers is satisfied if defense counsel receives wide latitude at trial to question witnesses. In short, the Confrontation Clause only guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Id.* (internal citations and quotations omitted).

H.V.Z.'s DoD Health Record is not in the possession, custody, or control of the Government under R.C.M. 701—nor under its control—as H.I.P.A.A. demands a subpoena or court order to produce the PHI. The Military Judge's erroneous view of the law assessing that H.V.Z.'s DoD Health Record is the possession, custody, or control of military authorities led to denying H.V.Z. the opportunity to object to the production of her records. This erroneous conclusion caused the

Military Judge to issue a court order to 56th MDG without authority to produce H.V.Z.'s DoD Health Record without the requirements to satisfy the *Nixon* factors. The Military Judge should have demanded showings that (1) the documents are evidentiary and relevant; (2) they are not otherwise procurable, with due diligence, in advance of trial; (3) the party cannot properly prepare for trial without such production and inspection in advance of trial; and (4) the application was made in good faith and is not a fishing expedition. *Nixon* at 699. The Military Judge's unreasonably ordered production of H.V.Z.'s DoD Health Record thus unnecessarily invades her privacy. This violates H.V.Z.'s statutory rights to be treated with fairness and respect for her dignity and privacy and violated her Constitutional right to protect her private information from unauthorized Government invasion. Article 6b(a)(9); US Const Amend. IV.

H.V.Z. argues for a lesser standard of review than employed by the A.F.C.C.A. to issue a writ; nevertheless, even utilizing a standard requiring she demonstrate the Military Judge clearly and indisputably erred, H.V.Z. requests issuance of writ of mandamus vacating the Military Judge's Ruling and Order as to her DoD Health Record. H.V.Z. desires remand to the trial court to conduct proceedings consistent with R.C.M. 703.

CONCLUSION

DoD Health Records are not in the possession, custody or control of military authorities as M.T.F.s are not military authorities and H.I.P.A.A. prevents prosecutors from having access to or control of the DoD Health Record without process. Prosecutors have no legal right to the records. If evidence demands process to obtain, that evidence is subject to the rules of production outlined in R.C.M. 703. When a party seeks to obtain personal or confidential information of a named victim requiring subpoena, that victim has the right to move to quash the subpoena or otherwise object. This right is encapsulated in R.C.M. 703(g)(3)(C)(ii) and R.C.M. 703(g)(3)(G) as amended in the most recent executive order.

Furthermore, A.F.C.C.A. employs an improper standard of review to issue a writ pursuant to Article 6b(e) as Article 6b is analogous to the C.V.R.A. and fully divorced from the All Writs Act. *See Randolph; see also MW.* The A.F.C.C.A. and all service Courts of Criminal Review should use ordinary standards of appellate reviewed as required by Congress in the C.V.R.A. Finally, the Military Judge clearly and indisputably erred when ordering production of H.V.Z.'s medical records under R.C.M. 701 and without hearing from H.V.Z. A writ should issue.

RESPECFULLY SUBMITTED this 12th day of September, 2023.

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CAAF Application will be sent in accordance with Rule 38(b)

CERTIFICATE OF FILING AND SERVICE

I certify that on September 12, 2023, the foregoing was electronically filed with the Court and served on the counsel for the Real Party in Interest, counsel for the Government, the lower court, the detailed military judge and other relevant parties via email at the following addresses:

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CERTIFICATE OF COMPLIANCE WITH RULE 24(b)

This brief complies with Rule 24(b) because this brief contains approximately

13776 words.

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M.W. v. United States

United States Court of Appeals for the Armed Forces

July 13, 2023, Decided

No. 23-0104

Reporter
2023 CAAF LEXIS 472 *; __ M.J. __; 2023 WL 4553704

M.W., Appellant v. UNITED STATES, Appellee and Marshall R. ROBINSON, Staff Sergeant, United States Air Force, Real Party In Interest

Notice: THIS OPINION IS SUBJECT TO EDITORIAL CORRECTION BEFORE FINAL PUBLICATION

Subsequent History: Reconsideration denied by *M.W. v. United States, 2023 CAAF LEXIS 574 (C.A.A.F., Aug. 7, 2023)*

Prior History: **[*1]** Crim. App. No. 2022-15. Military Judge: Dayle P. Percle.

In re United States, 2023 CCA LEXIS 57, 2023 WL 1525021 (A.F.C.C.A., Feb. 3, 2023)

Counsel: For Appellant: Captain Nicholas J. Hall and Devon A. R. Wells, Esq. (on brief).

For Appellee: Lieutenant, Colonel Matthew J. Neil, Captain Jocelyn Q. Wright, and Mary Ellen Payne, Esq. (on brief); Colonel Naomi P. Dennis.

For Real Party In Interest: Major Matthew Blyth and Captain Thomas Govan (on brief).

Amici Curiae for Appellant: Colonel Edward J. O'Sheehan, Captain Rocco J. Carbone III, and Paul Markland, Esq. (on behalf of the National Guard Special Victims' Counsel Program and the United States Coast Guard Victims' Legal Counsel Program) (on brief).

Judges: Judge MAGGS delivered the opinion of the Court, in which Chief Judge OHLSON, Judge SPARKS, Judge HARDY, and Judge JOHNSON joined.

Opinion by: MAGGS

Opinion

Judge MAGGS delivered the opinion of the Court.

In *EV v. United States, 75 M.J. 331, 332 (C.A.A.F. 2016)*, this Court held that it did not have jurisdiction to review a decision of a Court of Criminal Appeals (CCA) at the request of a "victim of an offense" as that term is used in *Article 6b, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 806b (2018)*. Although Congress has since amended *Article 6b, UCMJ*, and other provisions of the UCMJ, we are compelled to hold again today that this Court lacks jurisdiction to review a petition filed by a victim of an offense. Our decision rests solely **[*2]** on the statutory language of the UCMJ. It does not reflect any policy decision about whether this Court should have statutory jurisdiction, which is a matter solely for Congress. We further see no reason that Congress could not amend the UCMJ to grant this Court jurisdiction to review a petition filed by the victim of an offense. However, as currently written, neither the language of *Article 6b, UCMJ*, nor any other statute, grants this Court the necessary jurisdictional authority to review a petition filed by a victim of an offense. We therefore dismiss the petition in this case.

I. Background

Appellant, M.W., is the named victim of the charged offenses in this ongoing court-martial. Following voir dire, M.W.'s counsel communicated with trial counsel about how the Government might exercise challenges to some of the members detailed to the court-martial under Rule for Courts-Martial 912. The military judge ruled that this communication constituted unlawful influence in violation of *Article 37, UCMJ, 10 U.S.C. § 837 (2018)*. To cure the unlawful influence and prevent any possible prejudice, the military judge prohibited challenges by the Government to any of the members detailed to the court-martial.

M.W. and the Government each contested the military judge's ruling by **[*3]** petitioning the United States Air Force Court of Criminal Appeals (AFCCA) for writs of mandamus. M.W. filed her petition in the AFCCA as "the

victim of an offense" under the jurisdiction provided by *Article 6b(e)(1), UCMJ*. She argued that the military judge's ruling limited her statutory right under *Article 6b(a)(5), UCMJ*, to confer with trial counsel. The Government filed two petitions for mandamus. The Government recognized that *Article 62, UCMJ, 10 U.S.C. § 862 (2018)*, did not expressly identify the issue as a ground for interlocutory appeal, but the Government contended that the AFCCA could issue writs of mandamus under the *All Writs Act, 28 U.S.C. § 1651 (2018)*, in aid of its jurisdiction under *Article 62, UCMJ*. In the two petitions, the Government challenged the merits of the military judge's ruling and also sought relief in part on grounds that the military judge had improperly excluded trial counsel from a hearing at which the military judge considered the matter.

The AFCCA agreed with the Government that the military judge had erred in excluding trial counsel from the hearing. *In re United States, Misc. Dkt. Nos. 2022-09, 2022-10, 2022-15, 2023 CCA LEXIS 57, at *27, 2023 WL 1525021, at *10 (A.F. Ct. Crim. App. Feb. 3, 2023)* (unpublished). Accordingly, the AFCCA vacated the military judge's ruling and ordered the military judge to reconsider the matter after including the Government in a new hearing. *Id.2023 CCA LEXIS 57, at *31, 2023 WL 1525021, at *11-12*. Having vacated the military judge's order on this procedural **[*4]** ground, the AFCCA concluded that it did not need to address M.W.'s challenge to the merits of the military judge's ruling. *Id. 2023 CCA LEXIS 57, at *29, 2023 WL 1525021, at *10-11*. Accordingly, the AFCCA denied M.W.'s petition for a writ of mandamus as moot. *Id., 2023 CCA LEXIS 57, 2023 WL 1525021, at *11*.

M.W. then petitioned this Court for review, asking this Court to hold that her counsel has a right to confer with trial counsel when the case returns to the court-martial. She styled her filing in this Court as either a "Writ-Appeal Petition *or* Petition for Extraordinary Relief." In her petition, M.W. recognized this Court's holding in *EV, 75 M.J. at 332*, that this Court did not have jurisdiction to review a CCA's denial of a writ of mandamus under *Article 6b, UCMJ*, at the request of the victim of an offense. But M.W. asserted that a statutory amendment in 2017,[1] which added *Article 6b(e)(3)(C), UCMJ*, "is a *clarification* affirming this Court's jurisdiction to *review* orders of Courts of Criminal Appeals issued pursuant to petitions for relief filed by crime victims under *Article 6b, U.C.M.J.* jurisdiction."

Upon consideration of M.W.'s petition, together with answers filed by the Government and the Real Party in Interest[2] and a brief by amici curiae, this Court decided that the question of our jurisdiction required further briefing. We accordingly ordered **[*5]** M.W., the Government, and the Real Party in Interest to brief the following four issues:

> (a) whether *Article 67, UCMJ*, *10 U.S.C. § 867* grants this Court jurisdiction to review such a writ-appeal;
>
> (b) whether *Article 6b(e)(3), UCMJ*, grants this Court jurisdiction to review such a writ-appeal (as opposed to only requiring that this Court give priority to writ-appeals for which *Article 67, UCMJ*, or some other statute provides this Court jurisdiction);
>
> (c) whether any other statute provides this Court jurisdiction to review such a writ-appeal; and
>
> (d) whether subsequent amendments to the UCMJ require this Court to reconsider its holding in *E.V. v. United States, 75 M.J. 331 (C.A.A.F. 2016)*, that this Court does not have jurisdiction to review such a writ-appeal.

The parties duly complied with this order.

Having now considered the issue further with the aid of the parties' briefing, we conclude that this Court must dismiss M.W.'s petition for lack of jurisdiction. Although Congress has amended *Article 6b, UCMJ*, and other provisions of the UCMJ since we issued our opinion in *EV*, this Court still lacks jurisdiction to review a petition filed by a victim of an offense. We therefore dismiss the petition in this case.

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[1] *National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, § 531(a), 131 Stat. 1283, 1384 (2017)*. The amendment modified *Article 6b(e)(3), UCMJ*, by redesignating the existing provision as *Article 6b(e)(3)(A), UCMJ*, and by adding what is now *Article 6b(e)(3)(B)* and *(C)*, UCMJ. *Id.* These provisions are quoted later in this opinion. The amendments made in *§ 531(a)* became effective on January 1, 2019. *See id. § 531(p), 131 Stat. at 1388* ("The amendments made by this section shall take effect immediately after the amendments made by the *Military Justice Act of 2016 (division E of Public Law 114-328*) take effect as provided for in *section 5542 of that Act (130 Stat. 2967)*.").

[2] In a case involving a petition for extraordinary relief, the accused may be denominated as "the real party in interest" by a filing party or may be so designated by this Court. C.A.A.F. R. 17.

II. Standard of Review

This Court considers de novo the question of whether it has jurisdiction. *EV, 75 M.J. at 333* (citing *United States v. Kuemmerle, 67 M.J. 141, 143 (C.A.A.F. 2009)*, and *United States v. Harmon, 63 M.J. 98, 101 (C.A.A.F. 2006)*). Like **[*6]** all federal courts, we "have an independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party." *Arbaugh v. Y&H Corp., 546 U.S. 500, 514, 126 S. Ct. 1235, 163 L. Ed. 2d 1097 (2006)*.

III. Discussion

We consider in order the four questions that the parties address in their supplemental briefs.

A. *Article 67, UCMJ*

Neither M.W., nor the Government, nor the Real Party in Interest contends that *Article 67, UCMJ*, provides this Court with jurisdiction to review M.W.'s petition in this case. We agree with this assessment.

Article 67(a), UCMJ, grants this Court jurisdiction to review only three categories of cases, and this case does not fit into any of them. *Article 67(a)(1), UCMJ*, requires this Court to review "all cases in which the sentence, as affirmed by a Court of Criminal Appeals, extends to death." This language does not provide jurisdiction over M.W.'s petition because this is not a capital case in which a sentence of death has been adjudged and affirmed. *Article 67(a)(2), UCMJ*, requires this Court to review "all cases reviewed by a Court of Criminal Appeals which the Judge Advocate General . . . orders sent to the Court of Appeals for the Armed Forces for review." We have held that this provision allows the relevant Judge Advocate General to seek review of a denial of a writ of mandamus by a CCA. **[*7]** *LRM v. Kastenberg, 72 M.J. 364, 367 (C.A.A.F. 2013)*. But *Article 67(a)(2), UCMJ*, does not provide jurisdiction in this case because the Judge Advocate General of the Air Force has not ordered this case sent to this Court for review. *Article 67(a)(3), UCMJ*, provides this Court with jurisdiction in "all cases reviewed by a Court of Criminal Appeals in which, upon petition *of the accused* and on good cause shown, the Court of Appeals for the Armed Forces has granted a review." (Emphasis added.) This Court accordingly has jurisdiction when an accused has sought review of a CCA's decision on writ of mandamus. *Fink v. Y.B., 83 M.J. 222, 225 (C.A.A.F. 2023)* (per curiam). But *Article 67(a)(3), UCMJ*, does not provide jurisdiction in this case because an accused has not filed the petition now before us.

No other provision in *Article 67, UCMJ*, grants jurisdiction to this Court. *Article 67(b), UCMJ*, specifies how an accused may file a petition for review when seeking review under *Article 67(a)(3), UCMJ*, but it does not grant any jurisdiction. *Article 67(c), UCMJ*, enumerates the actions that this Court can take when it reviews cases under the jurisdiction provided in *Article 67(a), UCMJ*, but it also does not grant this Court any jurisdiction. *Article 67(d), UCMJ*, addresses this Court's power to order a rehearing if it sets aside the findings or the sentence of a court-martial, but it too does not grant this Court jurisdiction. And *Article 67(e), UCMJ*, concerns circumstances in which this **[*8]** Court has acted on a case and returned it to the Judge Advocate General, but it also does not grant this Court jurisdiction.

B. *Article 6b(e)(3), UCMJ*

The second question that the parties briefed is whether *Article 6b(e)(3), UCMJ*, provides this Court jurisdiction to review this case. To answer this question, we first examine the structure of *Article 6b, UCMJ*. The provision starts with *Article 6b(a), UCMJ*, which grants various rights to a "victim of an offense under this chapter." *Article 6b(e), UCMJ*, subsequently addresses "Enforcement by [a] Court of Criminal Appeals." *Article 6b(e)(1)* and *(2), UCMJ*, gives the victim of an offense the right to seek review of certain adverse rulings by petitioning a CCA for a writ of mandamus. *Section 6b(e)(3)* then provides:

> (3)(A) A petition for a writ of mandamus described in this subsection shall be forwarded directly to the Court of Criminal Appeals, by such means as may be prescribed by the President, subject to *section 830a* of this title (article 30a).
> (B) To the extent practicable, a petition for a writ of mandamus described in this subsection shall have priority over all other proceedings before the Court of Criminal Appeals.
>
> (C) Review of any decision of the Court of Criminal Appeals on a petition for a writ of mandamus described in this subsection shall have priority in the Court of Appeals **[*9]** for the Armed Forces, as determined under the rules of the Court of Appeals for the Armed Forces.

The first two of the quoted subsections, *Article*

6b(e)(3)(A) and (B), UCMJ, concern a CCA's review of a petition for mandamus filed by the victim of an offense. They say nothing about this Court. Accordingly, they do not provide this Court with jurisdiction. In contrast, the third subsection, Article 6b(e)(3)(C), UCMJ, directly addresses this Court. The question before us is whether this provision either expressly or implicitly grants jurisdiction to this Court to review a petition filed by the victim of an offense. We conclude that it does not.

In our view, Article 6b(e)(3)(C), UCMJ, addresses only the question of *how this Court should proceed* when it reviews a decision of a CCA upon a petition for a writ of mandamus authorized by Article 6b(e), UCMJ. Specifically, the provision requires this Court to give priority to such cases. Thus, if this Court were to review a CCA's decision on a petition for a writ of mandamus at the direction of the relevant Judge Advocate General under *Article 67(a)(2), UCMJ*, then Article 6b(e)(3)(C), UCMJ, would require this Court to give the case priority. Likewise, if this Court were to review such a case after granting a petition of the accused under *Article 67(a)(3), UCMJ*, then Article 6b(e)(3)(C), UCMJ, would require us to give the review priority. **[*10]** But Article 6b(e)(3)(C), UCMJ, contains no language that expressly or implicitly grants this Court jurisdiction to review any class of cases.

Unlike *Article 67(a), UCMJ*, which specifies three categories of cases that this Court "shall review," Article 6b(e)(3)(C), UCMJ, merely provides that in this Court "review" of such cases "shall have priority." An instruction about how to exercise jurisdiction is different from a provision granting it. We thus hold that Article 6b(e)(3), UCMJ, does not grant us jurisdiction to review a petition filed by the victim of an offense which asks us to review a decision of a CCA on petition for writ of mandamus.

M.W. disagrees with this analysis and conclusion. One of her arguments is that Congress in Article 6b(e), UCMJ, created a self-contained appellate review system that exists apart from the avenues of review that *Article 66(b)(2), UCMJ*, provides for the CCAs and that *Article 67(a), UCMJ*, provides for this Court. M.W. explains: "The CCAs need not seek jurisdiction in *Article 66* to review and issue writs under Article 6b(e); thus, a need to look to Article 67 for C.A.A.F. to review those actions contradicts the statutory scheme within Article 6b."

We agree that the text of Article 6b(e)(1), (2), and (3)(A), UCMJ, grants jurisdiction to the CCAs by providing that "the victim may petition the Court of Criminal Appeals for a writ of mandamus," and that a **[*11]** "petition for a writ of mandamus described in this subsection shall be forwarded directly to the Court of Criminal Appeals." The victim of an offense may rely on these provisions without relying on *Article 66(b), UCMJ*, when seeking a writ of mandamus. But we see nothing comparable in Article 6b(e)(3)(C), UCMJ, that creates jurisdiction in this Court. As explained above, Article 6b(e)(3)(C), UCMJ, addresses *how* this Court must review decisions of the CCAs but does not grant jurisdiction to review such decisions. And interpreting the provision to contain an implied grant of jurisdiction to this Court is not reasonable because the same provision contains an express grant of jurisdiction to the CCAs. Moreover, the express grant of jurisdiction to the CCAs would be redundant if Article 6b(e)(3)(B), which instructs the CCAs to give priority to petitions for mandamus, itself granted jurisdiction. *See* City of Chicago v. Fulton, 141 S. Ct. 585, 591, 208 L. Ed. 2d 384 (2021) (explaining the canon against surplusage); IBP, Inc. v. Alvarez, 546 U.S. 21, 34, 126 S. Ct. 514, 163 L. Ed. 2d 288 (2005) (explaining the presumption of consistent usage).

M.W. also asks us to follow what she considers the apparent intent of Congress. M.W. contends that Congress added Article 6b(e)(3)(C), UCMJ, after this Court's decision in E.V. for the specific purpose of providing jurisdiction in this Court. In EV, this Court held that Article 6b, UCMJ, did not grant jurisdiction to this Court to consider **[*12]** a petition of a victim of an offense because at the time there was "no mention whatsoever of this Court" in Article 6b, UCMJ. 75 M.J. at 334. But M.W. observes that is no longer true. She asserts: "To address C.A.A.F.'s language in E.V. finding Congress clearly intended no role for C.A.A.F. as the statute did not mention the Court . . . Congress specifically referred to C.A.A.F. in the amended statute to guarantee it contemplated a role for the Court."

We are unpersuaded. While it is true that Article 6b(e), UCMJ, now expressly mentions this Court, the pertinent passage, as explained above, is not a grant of jurisdiction. Instead, the added language concerns only *how* this Court must act (i.e., by according priority) if it reviews a CCA decision.

The Government also disagrees with our analysis and conclusion. Although the Government cannot point to language in Article 6b(e)(3), UCMJ, that expressly grants this Court jurisdiction, the Government asserts "it is apparent Congress intended to allow CAAF to review CCA decisions on victims' requests for writs of mandamus." The Government asserts: "There is no

reason for this Court to be required to give priority to review of a decision by a CCA on a writ of mandamus, if this Court did not already have jurisdiction **[*13]** to review such a decision in the first place." We disagree with the Government's argument because, as we have explained above, *Article 67(a)(2)* and *(3), UCMJ*, provides this Court with jurisdiction if a Judge Advocate General or the accused seeks review of the CCA, even though they do not provide jurisdiction when the victim of a crime seeks review.

The Government also asks us to consider the context in which Congress added *Article 6b(e)(3)(C), UCMJ*. The Government asserts that Congress made the amendment "at a time when neither a victim nor an accused could petition this Court for review of a CCA's Article 6b decision." In support of this argument the Government cites *EV, 75 M.J. at 334* (holding that this Court lacked jurisdiction over a petition by the victim), and *Randolph v. HV, 76 M.J. 27, 31 (C.A.A.F. 2017)* (holding that this Court lacked jurisdiction over a petition by the accused). The implication is that it would not have made sense for Congress to require expedited review at a time when *no review* was possible.

This argument is unpersuasive for two reasons. First, even before Congress enacted *Article 6b(e)(3)(C), UCMJ*, we had held that *Article 67(a)(2), UCMJ*, grants this Court jurisdiction to review a decision of a CCA on a petition for mandamus at the direction of the relevant Judge Advocate General. *LRM, 72 M.J. at 367*. Second, also before Congress enacted **[*14]** *Article 6b(e)(3)(C), UCMJ*, Congress already had enacted an amendment to this Court's jurisdiction under *Article 67(c), UCMJ*. The earlier amendment superseded this Court's decision in *Randolph* by giving this Court jurisdiction to review a decision of a CCA on a petition for mandamus at the request of the accused. *Fink, 83 M.J. at 225*. The effective date of this earlier amendment was selected by Congress to be the effective date for *Article 6b(e)(3)(C), UCMJ*, so that *Article 6b(e)(3)(C), UCMJ*, would take effect "immediately after" the amendment to *Article 67(c), UCMJ*.[3] Therefore, on the effective date of *Article 6b(e)(3)(C), UCMJ*, both the relevant Judge Advocate General and the accused could appeal the decision of a CCA upon a petition for mandamus under *Article 6b(e), UCMJ*, and *Article 6b(e)(3)(C), UCMJ*, required this Court to give priority to such cases. Thus, we do not agree that the timing of the amendment implicitly shows that *Article 6b(e)(3)(C), UCMJ*, grants this Court jurisdiction.

C. Other Statutes

As noted previously, M.W. styled her filing in this Court as both a "Writ-Appeal Petition" and a "Petition for Extraordinary Relief." As an alternative to the arguments discussed above, M.W. contends in her supplemental brief that the *All Writs Act, 28 U.S.C. § 1651 (2018)*, provides this Court with jurisdiction to grant her a writ of mandamus even if this Court holds that *Article 6b(e), UCMJ*, does not provide this Court with jurisdiction to review the AFCCA. We **[*15]** rejected a similar contention in *Randolph, 76 M.J. at 31*, when we held that the All Writs Act did not provide us jurisdiction to grant an *accused* a writ of mandamus as an alternative way of reviewing a CCA decision on a petition for a writ of mandamus. We explained:

> We also conclude that this Court lacks jurisdiction to consider this case under the All Writs Act. We have authority to act "in aid of" our existing jurisdiction, *28 U.S.C. § 1651(a)*, when "the harm alleged . . . ha[s] the potential to directly affect the findings and sentence." *Ctr. for Constitutional Rights v. United States, 72 M.J. 126, 129 (C.A.A.F. 2013)* (citing *Hasan v. Gross, 71 M.J. 416 (C.A.A.F. 2012)*). But "[t]he All Writs Act is not an independent grant of jurisdiction, nor does it expand a court's existing statutory jurisdiction." *LRM, 72 M.J. at 367* (citing *Clinton v. Goldsmith, 526 U.S. 529, 534-35, 119 S. Ct. 1538, 143 L. Ed. 2d 720 (1999)*). Because Article 6b(e) is a unique grant of statutory authority that limits appellate jurisdiction to the CCA, Appellant cannot use that article and the All Writs Act to artificially extend this Court's existing statutory jurisdiction.

[3] The *National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 5331, 130 Stat. 2000, 2934-35 (2016)*, amended ***Article 67(c)***. These amendments took effect on January 1, 2019. *See id. § 5542, 130 Stat. at 2967* (authorizing the President to designate the effective date of the amendments subject to certain constraints); *2018 Amendments to the Manual for Courts-Martial, United States, Exec. Order No. 13825, § 3(a), 83 Fed. Reg. 9889, 9889 (Mar. 1, 2018)* (specifying an effective date of January 1, 2019). The *National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, § 531(p), 131 Stat. at 1388*, provided that the amendments to *Article 6b(e), UCMJ*, "shall take effect immediately after the amendments made by the *Military Justice Act of 2016 (division E of Public Law 114-328*) take effect as provided for in *section 5542 of that Act (130 Stat. 2967)*.)"

Id. (alterations in original).[4] In *EV, 75 M.J. at 333*, we similarly reasoned that the All Writs Act could not provide this Court jurisdiction to grant a victim a writ of mandamus if *Article 6b, UCMJ*, did not provide us jurisdiction. We conclude that the same reasoning prevents us from reviewing the AFCCA's decision by granting a writ of mandamus to the victim.

D. *EV v. United States*

A final question is whether subsequent **[*16]** amendments to the UCMJ require this Court to reconsider its holding in *EV*. As mentioned above, this Court held in *EV* that it did not have jurisdiction to review the petition filed by a victim of an offense that seeks review of a CCA's denial of a writ of mandamus. *75 M.J. at 334*. This Court reasoned in that case that *Article 6b, UCMJ*, did not grant this Court jurisdiction in part because *Article 6b, UCMJ*, did not even mention this Court. *Id.* *Article 6b(e)(3)(C), UCMJ*, now mentions this Court, so that rationale of *EV* is no longer valid. But the result is the same because, as we have explained, while *Article 6b(e)(3)(C), UCMJ*, requires this Court to give priority to such appeals when this Court has jurisdiction, *Article 6b(e)(3)(C), UCMJ*, does not confer jurisdiction. Thus, the holding of *EV* has not been superseded.

IV. Conclusion

The petition is dismissed for lack of jurisdiction. The stay of proceedings that was ordered on February 10, 2023, is hereby lifted.

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[4] This Court held in *Fink* that amendments to ***Article 67, UCMJ***, now provide this Court with jurisdiction to review the decision of a CCA upon the petition of an accused. *See* *Fink, 83 M.J. at 225*. (concluding that *Randolph* has been superseded by statute). Our decision in *Fink*, however, did not change our reasoning with respect to the All Writs Act.

United States v. Harrington

United States Court of Appeals for the Armed Forces

October 26, 2022, Argued; August 10, 2023, Decided

No. 22-0100

Reporter
2023 CAAF LEXIS 577 *; __ M.J. __; 2023 WL 5270647

UNITED STATES, Appellee v. Sean W. HARRINGTON, Airman First Class, United States Air Force, Appellant

Notice: THIS OPINION IS SUBJECT TO EDITORIAL CORRECTION BEFORE FINAL PUBLICATION

Prior History: [*1] Crim. App. No. 39825. Military Judge: Christopher M. Schumann.

United States v. Harrington, 2021 CCA LEXIS 524, 2021 WL 4807174 (A.F.C.C.A., Oct. 14, 2021)

Counsel: For Appellant: Major Matthew L. Blyth (argued); Lieutenant Colonel Kirk W. Albertson and Mark C. Bruegger, Esq. (on brief).

For Appellee: Major Morgan R. Christie (argued); Colonel Naomi P. Dennis, Lieutenant Colonel Matthew J. Neil, and Mary Ellen Payne, Esq. (on brief); Major Brittany M. Speirs.

Judges: Judge HARDY delivered the opinion of the Court, in which Chief Judge OHLSON, Judge SPARKS, and Senior Judge EFFRON joined. Judge MAGGS filed a separate opinion concurring in part and dissenting in part.

Opinion by: HARDY

Opinion

Judge HARDY delivered the opinion of the Court.

A general court-martial convicted Appellant of involuntary manslaughter, communicating a threat, and two specifications related to the unlawful use of cocaine and marijuana. The panel members sentenced Appellant to a reduction in grade to E-1, fourteen years of confinement, and a dishonorable discharge. The United States Air Force Court of Criminal Appeals (AFCCA) affirmed the findings and sentence. *United States v. Harrington, No. ACM 39825, 2021 CCA LEXIS 524, at *4, 2021 WL 4807174, at *2 (A.F. Ct. Crim. App. Oct. 14, 2021)* (unpublished).

We granted review to decide three issues. First, whether the evidence was legally sufficient to support Appellant's conviction for communicating a threat. Second, whether **[*2]** the military judge abused his discretion by denying Appellant's request to instruct the panel members on the maximum punishment available for each of Appellant's offenses of conviction. And third, whether the military judge abused his discretion in allowing the Government trial counsel to participate in the delivery of the unsworn statement of the homicide victim's parents.

Because we conclude that the evidence was sufficient to allow any rational panel to find the elements of communicating a threat proven beyond a reasonable doubt, we decline to grant Appellant relief on the first issue.

However, we answer the second and third granted issues in the affirmative and conclude that Appellant is entitled to relief on these issues. The military judge abused his discretion in denying Appellant's request for an instruction on the maximum punishment for each individual offense because he did so based on an incorrect understanding of the law. Contrary to the military judge's apparent understanding, he possessed the discretion to instruct the panel on the maximum punishments available for each individual offense, in addition to informing them of the maximum cumulative punishment available for **[*3]** all offenses.

We also conclude that the military judge abused his discretion in permitting the victim's parents to deliver their unsworn statements through a question-and-answer format with trial counsel. Trial counsel's participation in the presentation of the unsworn victim statements is incompatible with the principle that unsworn victim statements are the sole province of the victim or the victim's designees.

The Government failed to meet its burden of proving that the two errors did not have a substantial influence on the adjudged sentence. We therefore affirm the AFCCA with respect to the findings but reverse with regard to the sentence.

I. Background

In July 2017, Appellant lived with roommates AB and BI. One night, AB went out with her friends, returning around four o'clock the next morning. AB testified that when she returned, she witnessed Appellant snort something that looked like cocaine. When AB got up the next day, she found liquor all over the house and could tell that Appellant and BI had been drinking heavily. AB then drove BI to an Alcoholics Anonymous (AA) meeting. While AB and BI were out, Appellant engaged AB in an exchange of text messages that formed the basis for **[*4]** his conviction for communicating a threat. In a string of texts, Appellant asked AB what had happened the previous night, explaining that he was at that moment "outside," "tripping balls so hard," and "damn near naked." Appellant told AB, "you are my light right now." He also expressed fury that someone had "hog tied" him while he was asleep or otherwise incapacitated. Appellant repeatedly pressed AB for information on who had tied him up, and stated, "whoever the sick sadistic mf who did this I'm going to kill." Appellant texted AB, "[t]ell me who did it and I'll go easy on you." Appellant said he was "dead as [sic] serious" and, after pressing AB on who had tied him up, asked "did anyone come over?" BI testified that AB thought Appellant was being "rude," and that AB seemed "annoyed" at these texts.

When AB and BI returned home, Appellant was sitting in a chair with a handgun nearby and something like twine strewn around him. At trial, AB testified that she knew before this incident that Appellant owned a gun, although she had never seen it. AB claimed that Appellant turned the gun to point it toward her, but BI testified that he never saw Appellant move the weapon. AB testified that **[*5]** Appellant's previous text messages "became real" upon seeing Appellant with the gun. The situation resolved after BI took the gun and walked away with it.

The Government charged Appellant with communicating a threat in violation of *Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934 (2012)*, and aggravated assault, in violation of *Article 128, UCMJ, 10 U.S.C. § 928 (2012)*, in connection with these events.[1] The Government also charged Appellant with using cocaine and marijuana on divers occasions, both in violation of *Article 112a, UCMJ, 10 U.S.C. § 912a (2012)*.

After the referral of these charges to a general court-martial, Appellant was involved in a shooting that resulted in the death of a fellow airman. Appellant called the police the morning of July 5, 2018, and reported that his friend had been shot in the head. Appellant told the operator that the victim had been "playing with a . . . gun." Although Appellant initially denied knowing what had happened, he eventually admitted that the gun had accidentally "discharged" in his own hand. The victim died four days later.

After the shooting, the convening authority withdrew and dismissed the original charges to provide for "further investigation of additional charges and consolidation of all known charges into one proceeding." The convening authority ultimately referred the **[*6]** final charges to trial by general court-martial on February 27, 2019.[2] A military judge convicted Appellant, consistent with his pleas, of using cocaine and marijuana on divers occasions, both in violation of *Article 112a, UCMJ*. Also consistent with his pleas, the panel members found Appellant not guilty of aggravated assault in violation of *Article 128, UCMJ*, for allegedly pointing his handgun at AB. Contrary to his pleas, however, the panel members convicted Appellant of communicating a threat in violation of *Article 134, UCMJ*. Although the Government had charged Appellant with murder for the death of the shooting victim, the members convicted Appellant, contrary to his pleas, of the lesser included offense of involuntary manslaughter in violation of *Article 119, UCMJ, 10 U.S.C. § 919 (2012)*.

Two events occurred during the sentencing phase of Appellant's court-martial that form the basis of the second and third questions presented. First, the military

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[1] The specification for communicating a threat referenced Appellant's texts "whoever the sick sadistic mf who did this I'm going to kill" and "[t]ell me who did it and I'll go easy on you." It did not include the alleged displaying or brandishing of the handgun.

[2] All of Appellant's crimes occurred before January 1, 2019. However, because the repreferral occurred after January 1, 2019, unless otherwise noted, all references to the nonpunitive articles of the UCMJ, Rules for Courts-Martial (R.C.M.), and Military Rules of Evidence are to the *Manual for Courts-Martial, United States* (2019 ed.) (*MCM*).

judge denied Appellant's request to instruct the panel about the maximum punishment for each of the four offenses for which the court-martial found Appellant guilty. Second, the military judge overruled Appellant's objection to the presentation of the victim's parents' unsworn victim **[*7]** statements via a question-and-answer format with trial counsel. Additional details about each of these events are presented below.

The panel members sentenced Appellant to a dishonorable discharge, reduction to the grade of E-1, and confinement for fourteen years. The convening authority took no action on the findings or sentence, and the AFCCA affirmed. *Harrington, 2021 CCA LEXIS 524, at *4, 2021 WL 4807174, at *2*.

We granted review to decide three issues:

> I. Whether the evidence is legally sufficient to support Appellant's conviction for communicating a threat?
>
> II. Did the military judge abuse his discretion by refusing to instruct the members of the maximum confinement for each offense, which ultimately resulted in an excessive 14-year sentence?
>
> III. Whether the military judge abused his discretion in allowing the victim's parents to take the witness stand and deliver unsworn statements in question-and-answer format with trial counsel?

United States v. Harrington, 82 M.J. 267 (C.A.A.F. 2022) (order granting review). We address each issue in turn.

II. Discussion

A. Legal Sufficiency of Appellant's Conviction for Communicating a Threat

We review the legal sufficiency of convictions de novo. *United States v. King, 78 M.J. 218, 221 (C.A.A.F. 2019)* (citing *United States v. Kearns, 73 M.J. 177, 180 (C.A.A.F. 2014)*). A conviction is legally sufficient if, "'after viewing the evidence in the light most favorable to the **[*8]** prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *United States v. Robinson, 77 M.J. 294, 297-98 (C.A.A.F. 2018)* (quoting *United States v. Rosario, 76 M.J. 114, 117 (C.A.A.F. 2017)*). Because we impinge upon the panel's discretion "only to the extent necessary to guarantee the fundamental protection of due process of law," *Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)*, we impose "a very low threshold" to sustain a conviction, *King, 78 M.J. at 221* (internal quotation marks omitted) (citation omitted).

The President has specified four elements for communicating a threat under *Article 134, UCMJ*: (1) that the accused communicated certain language expressing a present determination or intent to wrongfully injure the person, property, or reputation of another person, presently or in the future; (2) that the communication was made known to that person or to a third person; (3) that the communication was wrongful; and (4) that, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces. *MCM* pt. IV, para. 110.b. (2016 ed.); *see also United States v. Rapert, 75 M.J. 164, 166-67 (C.A.A.F. 2016)*. Appellant argues that no reasonable factfinder could have found the first and third elements proven beyond a reasonable doubt.

The first element of communicating a threat requires an objective **[*9]** inquiry, analyzing the existence of a threat from the viewpoint of a "reasonable person *in the recipient's place*." *United States v. Phillips, 42 M.J. 127, 130 (C.A.A.F. 1995)* (emphasis added). This objective inquiry examines both the language of the communication itself as well as its surrounding context, which may qualify or belie the literal meaning of the language. *United States v. Brown, 65 M.J. 227, 231 (C.A.A.F. 2007)*. In contrast to the first element, the third element's requirement of wrongfulness is properly understood in relation to the *subjective* intent of the speaker. *Rapert, 75 M.J. at 169*. In determining if the speaker's subjective intent was wrongful under the third element, the key question is not whether the speaker intended to carry out the object of the threat, but rather "whether the speaker intended his or her words *to be understood as sincere*." *Id. at 169 n.10*.

In this case, we first hold that the Government introduced sufficient evidence for a rational factfinder to conclude that a reasonable person would have perceived the communications as threatening. Appellant used inherently menacing language that expressed both violence ("whoever the sick sadistic mf who did this I'm going to kill") and sincerity ("I'm f**king dead as [sic] serious"). Appellant's statement to AB to "[t]ell me who did it and I'll go easy **[*10]** on you" could reasonably be interpreted as threatening violence against AB when read in context alongside the other messages.

Bolstering this conclusion is AB's testimony that she was aware Appellant owned a gun. Appellant also indicated to AB during their exchange of texts that he was under the influence of drugs. It would not be irrational for the panel to conclude that Appellant's declaration of his intent to kill would be perceived as more threatening by a reasonable person who knew that Appellant was both intoxicated and in possession of a deadly weapon.

In support of his legal insufficiency argument, Appellant points to various pieces of evidence that he claims directly conflict with the panel members' findings. For example, he notes that just three days after Appellant sent AB the threatening text messages, AB invited Appellant to "[c]ome smoke with [her]." Appellant also points to BI's testimony, which described AB's reaction to the texts as one of annoyance rather than fear. This evidence does not preclude a determination that Appellant's texts would be perceived as threatening by a reasonable recipient. Although the recipient's reaction to the alleged threat provides useful **[*11]** context, it does not control any element of communicating a threat under *Article 134, UCMJ*. Even if the panel had fully credited BI's testimony (which it was under no obligation to do) and found that AB did not actually feel threatened by the texts, the panel could nevertheless have concluded that AB's reaction simply differed from that of a reasonable person.[3]

We also hold that a rational factfinder could have concluded that Appellant subjectively intended his messages to be perceived as threatening. Much of the evidence supporting the panel members' determination that the texts were objectively threatening also supports this conclusion. For example, a rational trier of fact could have found that the menacing language of the messages indicated a subjective intent to threaten the recipient.

We note that Appellant allegedly displayed his handgun to AB and BI upon their return from the AA meeting. Appellant argues that we should not consider this fact when analyzing the context around the text messages given the potential for overlap between this conduct and the panel's not guilty verdict on the charge of aggravated assault. Although Appellant concedes that "'defendants are generally acquitted of offenses, **[*12]** not of specific facts, and thus to the extent facts form the basis for other offenses, they remain permissible for appellate review,'" Reply for Appellant at 6-7, *United States v. Harrington*, No. 22-0100 (C.A.A.F. May 23, 2022) (alteration in original removed) (quoting *Rosario, 76 M.J. at 117*), he attempts to distinguish this case based on the passage of time between the sending of the text messages and the alleged display of the handgun.

We decline to adopt a bright-line rule as to when later-in-time conduct may be considered and instead hold that the appropriateness of considering such conduct will turn on the facts of each individual case. Here, the Government introduced evidence sufficient for a rational factfinder to conclude that Appellant displayed the gun less than thirty minutes after the exchange of texts. Given that the menacing gesture occurred so soon after Appellant sent the threatening texts, the panel could permissibly consider the conduct in concluding that Appellant subjectively intended the text messages to be threatening. Accordingly, Appellant's attempt to distinguish the rule from *Rosario* is unpersuasive.[4]

We cannot say that no rational trier of fact could find the objective and subjective elements of communicating a threat proven beyond a reasonable **[*13]** doubt here. As a result, the evidence is legally sufficient to support Appellant's conviction for communicating a threat under *Article 134, UCMJ*.

B. Denial of Appellant's Requested Instruction on the Maximum Punishment for Each Offense

Prior to the parties' sentencing arguments, the military judge held an *Article 39(a)* session outside the presence of the panel members.[5] At this hearing, defense counsel

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[3] Indeed, the panel would have had good reason not to credit BI's testimony. BI testified that he could not "recall" or "remember" various details about the interactions between AB and Appellant. He also testified that he never saw the text messages at issue in the case and that he was intoxicated at the time of some of the events in question.

[4] Appellant also argues that *Rosario* is distinguishable because, according to Appellant, AB could not have been a credible witness. However, credibility determinations are uniquely the province of the trier of fact, and we will not disturb Appellant's conviction on this ground. *See United States v. Scheffer, 523 U.S. 303, 312-13, 118 S. Ct. 1261, 140 L. Ed. 2d 413 (1998)* (discussing that in criminal trials, a "core function" of the factfinder is to make credibility determinations).

[5] *See Article 39(a), UCMJ, 10 U.S.C. § 839(a) (2018)* (authorizing military judges to hold proceedings outside the presence of the members for certain purposes).

requested that during the sentencing instructions, the military judge explain to the members the maximum possible punishment for each offense. The military judge denied this request, stating:

> Members are never instructed on what a specific maximum punishment is for each individual offense. It's under our unitary principle. They're always just told here's the maximum and they are at liberty to decide that either the maximum or no punishment is appropriate in light of all of the offenses in the case.

Transcript of Record at 1131-32, *United States v. Harrington*, __ M.J. __ (C.A.A.F. 2023) (No. 22-0100). In support of his ruling, the military judge cited both R.C.M. 1005(e)—which requires the military judge to instruct the panel on the maximum authorized punishment that may be adjudged—and an Army service court opinion, *United States v. Purdy, 42 M.J. 666 (A. Ct. Crim. App. 1995)*. In *Purdy*, the United States Army Court of Criminal Appeals (ACCA) stated: "Court members **[*14]** should not be informed of the reasons for the maximum period of confinement. They should only be concerned with the maximum imposable sentence and not the basis for the limitation." *Id. at 671*. Appellant argues that the military judge erred by denying defense counsel's requested instruction.[6]

We review a military judge's denial of a proposed instruction for an abuse of discretion. *United States v. Carruthers, 64 M.J. 340, 345-46 (C.A.A.F. 2007)* (first citing *United States v. Damatta-Olivera, 37 M.J. 474, 478 (C.M.A. 1993)*; and then citing *United States v. Rasnick, 58 M.J. 9, 10 (C.A.A.F. 2003)*). Generally, a military judge "has substantial discretionary power in deciding on the instructions to give" in response to requests by counsel. *Damatta-Olivera, 37 M.J. at 478*. In the specific context of a military judge's denial of a requested instruction, an abuse of discretion will occur if: (1) the requested instruction was correct; (2) the instruction was not substantially covered by the main instruction; and (3) the instruction was on such a vital point in the case that the failure to give it deprived the accused of a defense or seriously impaired its presentation. *Carruthers, 64 M.J. at 346*. More generally, however, any legal ruling based on an erroneous view of the law also constitutes an abuse of discretion. *United States v. Inabinette, 66 M.J. 320, 322 (C.A.A.F. 2008)* (first citing *United States v. Griggs, 61 M.J. 402, 406 (C.A.A.F. 2005)*; then citing *United States v. Wardle, 58 M.J. 156, 157 (C.A.A.F. 2003)*; and then citing *United States v. Sullivan, 42 M.J. 360, 363 (C.A.A.F. 1995)*).

Under the version of the UCMJ and Rules for Courts-Martial that apply in **[*15]** this case, military courts impose unitary sentences—a single sentence that accounts for all the offenses for which the defendant was found guilty rather than distinct sentences for each individual offense of conviction. R.C.M. 1002(b) (2016 ed.).[7] Consistent with this approach, R.C.M. 1005(e)(1) requires the military judge to instruct panel members on the maximum authorized punishment that may be adjudged. In a case involving multiple offenses, this maximum authorized punishment is the cumulative total of the punishments authorized by the *Manual* for each offense of conviction. *See* R.C.M. 1005(e) Discussion. In *United States v. Gutierrez*, this Court's predecessor recognized that even under the military's unitary sentencing system, a military judge is not prohibited from instructing panel members on the maximum punishments authorized for each offense of conviction in addition to the maximum cumulative punishment. *11 M.J. 122, 124 (C.M.A. 1981)*.

Although our predecessor Court's opinion in *Gutierrez* would appear to settle the question whether a military judge has discretion to instruct panel members on the maximum punishments authorized for each offense of conviction, the Government argues that intervening changes in the *Manual* abrogated that decision, stripping the military **[*16]** judge of any authority to give the requested instruction. The Government even suggests that "the military judge would have abused his

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[6] It bears noting that panel sentencing instructions will cease to be an issue in noncapital cases in the military justice system. Congress recently amended ***Article 53, UCMJ, 10 U.S.C. § 853***, to provide for military judge-alone sentencing in such cases. ***National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, § 539E(a)***, ***(f), 135 Stat. 1541, 1700, 1706 (2021)*** (providing that the provisions regarding military judge-alone sentencing "shall apply to sentences adjudged in cases in which all findings of guilty are for offenses that occurred after the date that is two years after the date of the enactment of [the] Act).

[7] The President specified that the version of ***Article 56(c)*** ("Imposition of Sentence") in effect in 2019 and its associated rules would apply only to cases in which all specifications allege offenses committed on or after January 1, 2019. *2018 Amendments to the Manual for Courts-Martial, United States, Exec. Order No. 13,825, § 10(a), 83 Fed. Reg. 9889, 9890-91 (Mar. 1, 2018)*. Here, Appellant committed all his offenses before January 1, 2019. Accordingly, the 2016 edition of R.C.M. 1002(b) and R.C.M. 1005(c) and (e) (which implement ***Article 56(c)***) governed Appellant's court-martial.

discretion if he gave the defense-requested instruction without any basis in law to do so." Brief for Appellee at 31, *United States v. Harrington*, No. 22-0100 (C.A.A.F. May 13, 2022).

We find nothing in the *Manual* that supports this assertion. R.C.M. 1005(e)(1)'s requirement that a military judge must instruct the panel members on the maximum cumulative sentence in no way prohibits an additional instruction on the maximum punishment for each offense of conviction. Despite the intervening changes to the *Manual* upon which the Government relies, the military judge in *Gutierrez* was also required to instruct panel members about the maximum authorized punishment, *MCM* para. 76.*b*(1) (1969 rev. ed.), and the Court implicitly rejected the argument—raised by Chief Judge Everett in his concurring opinion—that an instruction as to the maximum punishment for each separate offense "runs counter to the theory of the 'unitary sentence.'" *Gutierrez, 11 M.J. at 125* (Everett, C.J., concurring in the judgment). Indeed, the companion provision of R.C.M. 1005(c) explicitly permits parties to request instructions on the law of sentencing. *See* R.C.M. 1005(c) (2016 ed.) (explaining that "any party may request that the military judge **[*17]** instruct the members on the law as set forth in the request"). We see no reason why this would not include a request for an instruction about the maximum punishment for each offense of conviction.[8]

At oral argument, the Government posited a different defense of the military judge's ruling: that he denied defense counsel's request not because he thought it was unlawful to give such an instruction, but because it would be imprudent to do so.[9] If we could accept this interpretation of the military judge's ruling—that the military judge recognized that he could grant Appellant's request, but he was declining to do so—we would review it for an abuse of discretion. *Carruthers, 64 M.J. at 345-46*; *see also Gutierrez, 11 M.J. at 124* (suggesting that individualized instructions would not be permissible if they "mislead the members as to the total maximum punishment"). The Government's argument fails because the military judge's ruling does not support such a characterization.

In denying Appellant's request, the military judge explained:

> Members are never instructed on what a specific maximum punishment is for each individual offense. It's under our unitary principle. They're always just told here's the maximum and they are at liberty to decide that **[*18]** either the maximum or no punishment is appropriate in light of all of the offenses in the case.

Transcript of Record at 1131-32, *United States v. Harrington* (No. 22-0100). The military judge's absolutist language—that "members are *never* instructed" and that "[t]hey're *always* just told"—undermines the Government's interpretation of the ruling. (Emphasis added.) The most natural reading of the military judge's comments parallels the reasoning of the Government's original argument: that members are never instructed on maximum sentences for individual offenses of conviction because such instructions are never permissible under a unitary sentencing system. *See* Brief for Appellee at 29, *United States v. Harrington*, No. 22-0100 (C.A.A.F. May 13, 2022) (asserting that "the plain language of R.C.M. 1005(e) . . . did not allow for the defense's requested instruction").

Contrary to the military judge's apparent understanding (and the Government's argument in support of that apparent understanding), neither the practice of general unitary sentencing nor the Rules for Courts-Martial foreclosed the military judge from instructing the panel on the maximum punishment for each offense of conviction. The military judge therefore abused his discretion by declining Appellant's requested **[*19]** instruction based on an erroneous view of the law.[10]

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[8] The Government does not rely upon the ACCA's decision in *Purdy* in support of its argument that the military judge lacked authority to give the requested instruction. We note, however, that the lower court's reliance on *Purdy* was misplaced for two reasons. First, the ACCA's decision in *Purdy* addressed a different sentencing issue—whether the military judge erred by informing the members that the maximum possible confinement to which the panel could sentence the accused had been reduced due to a multiplicity issue. And second, the ACCA's decision in *Purdy* could not overturn our predecessor's decision in *Gutierrez*.

[9] *See* Oral Argument at 32:31-36:34, *United States v. Harrington*, __ M.J. __ (C.A.A.F. Oct. 26, 2022) (No. 22-0100) https://www.armfor.uscourts.gov/newcaaf/CourtAudio11/20221026B.mp3.

[10] To be clear, nothing in this opinion should be interpreted as requiring a military judge to instruct the members on the maximum sentence for each offense should the accused request such an instruction. We only hold that the military judge abused his discretion because of his misbelief that such an instruction was foreclosed as a matter of law. Because the

C. Delivery of a Victim's Unsworn Statement via Answers to Trial Counsel's Questioning

Upon learning that the Government intended to present the unsworn statements of Appellant's victim's parents in a question-and-answer format with trial counsel, defense counsel objected, arguing that the format was not permissible under R.C.M. 1001(c). The military judge overruled the objection, stating that R.C.M. 1001(c) did not prohibit the format and noting that R.C.M. 801(a)(3) empowered him to exercise reasonable control over the proceedings. The military judge agreed with the Government that the format would give trial counsel greater control over the scope of questioning to keep their statements within the appropriate confines of R.C.M. 1001.

We review a military judge's interpretation of R.C.M. 1001 de novo. *United States v. Edwards, 82 M.J. 239, 243 (C.A.A.F. 2022)*. We review a military judge's admission of an unsworn victim statement for an abuse of discretion. *Id.* A military judge abuses his discretion when his legal findings are erroneous, *United States v. Barker, 77 M.J. 377, 383 (C.A.A.F. 2018)*, or when he makes a clearly erroneous finding of fact. *United States v. Eugene, 78 M.J. 132, 134 (C.A.A.F. 2018)*.

Once again, this Court is presented with the question whether a novel approach toward the delivery of a victim's unsworn statement exceeds what the President has authorized **[*20]** under R.C.M. 1001(c)(5), and again we conclude that it does. *See Edwards, 82 M.J. at 241* (finding reversible error when the military judge allowed the victim's de-signee to present his unsworn victim statement in the form of a video slideshow set to background music). Presentation of the victim's unsworn statement via a question-and-answer format with trial counsel violates the Rules for Courts-Martial because it contravenes the principle that an unsworn victim statement belongs solely to the victim or the victim's designee. *Id.* (first citing *United States v. Hamilton, 78 M.J. 335, 342 (C.A.A.F. 2019)*; and then citing *Barker, 77 M.J. at 378*).

Historically, criminal trials have been an adversarial proceeding between two opposing parties—the accused and the government. *See* Juan Cardenas, *The Crime Victim in the Prosecutorial Process*, 9 Harv. J. L. & Pub. Pol'y 357, 371 (1986) (noting that "the American system of public prosecution was fairly well established by the time of the American Revolution"). More recently, Congress has changed the traditional paradigm by providing the victims of the accused's crimes with limited authority to participate in the proceedings. *See, e.g.*, *Crime Victims' Rights Act, 18 U.S.C. § 3771 (2018)* (establishing the rights of crime victims in federal courts); *Article 6b, UCMJ, 10 U.S.C. § 806b (2018)* (establishing the rights of crime victims in the military justice system). In the military justice system, victims **[*21]** of certain sex-related offenses and certain domestic violence offenses not only have limited rights to participate in the proceedings but may also be represented by a special victims' counsel at government expense. Special victims counsel represent the victim's interests instead of the government's. *See 10 U.S.C. § 1044e(c)* ("The relationship between a Special Victims' Counsel and a victim in the provision of legal advice and assistance shall be the relationship between an attorney and client."). Although the interests of victims and the government often align, we note that this is not always the case. *See, e.g., United States v. Horne, 82 M.J. 283, 289-90 (C.A.A.F. 2022)* (holding that trial counsel committed unlawful command influence when she instructed investigators not to interview the victim's husband at the special victims' counsel's request).

Among the rights granted by Congress to victims of an offense in the military justice system is "[t]he right to be reasonably heard" at the court-martial sentencing hearing related to that offense. *Article 6b(a)(4), UCMJ*. In noncapi-tal cases, the President has authorized a victim (or the victim's lawful representative or designee) to exercise that right by making "a sworn statement, an unsworn statement, or both." R.C.M. 1001(c)(2)(D)(ii). If a victim elects to **[*22]** make an unsworn statement—as the parents of Appellant's shooting victim did in this case—the unsworn statement may be delivered orally, or in writing, or in a combination of both formats. R.C.M. 1001(c)(5)(A). The President has expressly authorized the victim's counsel to deliver all or part of the victim's unsworn statement on behalf of the victim for good cause shown. R.C.M. 1001(c)(5)(B).

In *Edwards*, this Court reaffirmed the principle "that unsworn victim statements belong solely to the victim or the victim's designee." *82 M.J. at 246* (first citing *Barker, 77 M.J. at 378*, and then citing *Hamilton, 78 M.J. at 342*). We explained that the government may not use unsworn victim statements to supplement its own sentencing arguments, nor may it misappropriate the

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military judge abused his discretion in this manner, we need not—and do not—express a view on what the outcome would have been here of applying the three-part test from *Carruthers, 64 M.J. at 346*.

victim's statutory right to be heard. *Id.* By participating in the delivery of the victim statements, the trial counsel in this case violated that principle.

The Government defends trial counsel's actions in this case as mere "facilitation," and points out that the question-and-answer format did not involve the same level of government involvement as was present in *Edwards*. Brief for Appellee at 42-43, *United States v. Harrington*, No. 22-0100 (C.A.A.F. May 13, 2022). In essence, the Government argues that instead of adopting a bright-line rule forbidding any participation by trial counsel **[*23]** in the presentation of unsworn victim statements, we should allow some level of trial counsel assistance, especially when—as was the case here—those speaking on behalf of the victim were not represented by a special victims' counsel. We decline to adopt this approach for three reasons.

First, as the military justice system proceeds into a future where multiple entities participate in courts-martial proceedings—including the accused, the government, and the victim—we recognize the importance of maintaining the separate authorities of each as set out by Congress and the President. Unsworn victim statements are not sentencing evidence, but vindication of the victim's statutory right to be reasonably heard. *United States v. Tyler, 81 M.J. 108, 112 (C.A.A.F. 2021)*; *Article 6b(a)(4)(B), UCMJ*. Unsworn victim statements are not delivered under oath, the victim making the unsworn statement is not considered a "witness" for the purposes of *Article 42(b), UCMJ*, *10 U.S.C. § 842(b)*, the victim may not be cross-examined by either trial or defense counsel, and unsworn statements are not subject to the Military Rules of Evidence. *Tyler, 81 M.J. at 112*; R.C.M. 1001(c)(1), (c)(5)(A). Trial counsel's participation in the presentation of the unsworn statement—especially in a question-and-answer format that closely resembles the presentation of actual evidence during **[*24]** every other phase of the trial—unnecessarily blurs the distinction between actual sentencing evidence and the unsworn victim statement.[11]

Second, the Government's own statements to the military judge in response to defense counsel's objection to the proposed format of the unsworn victim statement belie the Government's argument here that trial counsel's participation was mere "facilitation." The Government defended the question-and-answer format specifically on the ground that it gave trial counsel the ability to control the flow of the statement and prevent it from going outside the bounds permitted by the rules. We take the Government at its word that it had laudable intentions—preventing a potential violation of R.C.M. 1001(c)(3)'s limits on what may be included in an unsworn victim statement—by adopting the question-and-answer format, but this approach still gave trial counsel influence over the substance of the statement. By ceding control of the victim statement to trial counsel, the military judge made it impossible for us to attribute these unsworn statements "solely to the victim[s]." *Edwards, 82 M.J. at 246* (first citing *Barker, 77 M.J. at 378*; and then citing *Hamilton, 78 M.J. at 342*).[12]

Finally, we disagree with the Government that *Article 6b(a)(5), UCMJ*, requires that **[*25]** trial counsel be allowed to engage the victim in a question-and-answer format to present an unsworn victim statement. This provision grants the victim "[t]he reasonable right to confer with the counsel representing the Government" at several trial proceedings, including sentencing. *Article 6b(a)(5), UCMJ*. The Government reads this provision, alongside *Article 6b(a)(4)*'s granting of the right to be reasonably heard, to mean that trial counsel may "facilitate" the right to be reasonably heard through a question-and-answer format with trial counsel, if desired by the victim. Brief for Appel-lee at 45, *United States v. Harrington*, No. 22-0100 (C.A.A.F. May 13, 2022). This argument stretches the meaning of "confer" too far. Given the absence of any suggestion in the Rules for Courts-Martial that trial counsel may participate in the delivery of an unsworn statement, and the presence of an express provision permitting "the crime victim's counsel, if any, to deliver all or part of the crime victim's unsworn statement," for good cause shown, R.C.M. 1001(c)(5)(B), we believe that *Article 6b(a)(5)* simply

[11] The Government argues that Appellant waived any objection to the fact that the victim's parents sat in the witness stand when they participated in the question-and-answer exchange with trial counsel. Appellant raised a timely objection prior to the delivery of the unsworn victim statements to the question-and-answer format proposed by the trial counsel. We find Appellant's general objection to the format—and the absence of any specific waiver related to the witness stand—sufficient to allow us to consider this fact on appeal.

[12] We note that the Government is not powerless to prevent the victim from exceeding the limits of R.C.M. 1001(c)(3) even if trial counsel does not participate in the presentation of the un-sworn victim statement. The Discussion to R.C.M. 1001(c)(5) expressly notes: "Upon objection by *either party*, . . . a military judge may stop or interrupt a victim's statement that includes matters outside the scope of R.C.M. 1001(c)(3)." (Emphasis added.)

grants the victim the right to seek the advice or opinion of trial counsel in preparation for making an un-sworn statement. *See Merriam-Webster's Collegiate Dictionary* 260 (11th ed. 2020) (confer: "to compare views or to take counsel"). **[*26]** Indeed, it would be passing strange to read the *Article 6(b)* right to confer as providing trial counsel with the unconditional right to participate in the delivery of the unsworn statement when a victim's own counsel cannot do so absent a showing of good cause. The right to confer does not, therefore, encompass a one-sided exchange of questions for answers, given for the purpose of informing a separate listener.[13]

Trial counsel's participation in the delivery of the victim's unsworn statement via a question-and-answer format violates the principle that an unsworn victim statement belongs solely to the victim. We accordingly hold that the military judge abused his discretion by permitting trial counsel and the victim's parents to present the unsworn victim statements in this format.[14]

D. Prejudice

Having found an abuse of discretion in both the denial of the requested instruction on maximum punishments and in permitting the unsworn victim statements to be delivered through a question-and-answer format with trial counsel, we now turn to the question of prejudice. To determine prejudice when errors occur during sentencing, the fundamental question is "'whether the error substantially influenced the adjudged **[*27]** sentence.'" *Edwards, 82 M.J. at 246* (quoting *Barker, 77 M.J. at 384*). In the case at hand, given the presence of two separate errors during sentencing, we conclude that the Government failed to meet its burden of demonstrating that the cumulative errors did not have a substantial influence on the adjudged sentence.

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[13] We also note that under R.C.M. 1001(c)(5)(B), the victim must present a proffer of the unsworn statement to both defense counsel *and* trial counsel, further undermining the Government's broad interpretation of the right to confer.

[14] Appellant also argues that the question-and-answer format used in this case violated R.C.M. 1001(c)(5)(A)'s requirement that the victim's unsworn statement "be oral, written, or both." Because we find that the military judge erred by allowing trial counsel to participate in the presentation of the unsworn statement, we need not and do not decide whether the question-and-answer format exceeded the limits of R.C.M. 1001(c)(5)(A).

1. Denial of the Requested Instruction

To evaluate prejudice when a military judge erroneously denies a requested instruction, this Court tests for harmless error. *United States v. Rush, 54 M.J. 313, 315 (C.A.A.F. 2001)*; *see also United States v. Miller, 58 M.J. 266, 271 (C.A.A.F. 2003)* (characterizing its prejudice analysis simply as "[h]armlessness"). In the sentencing context, harmless error analysis requires the Court to determine whether the error "substantially influenced the sentence proceedings" such that it led to the appellant's sentence being unfairly imposed. *Rush, 54 M.J. at 315*.

The court-martial convicted Appellant of four offenses that carried the following maximum sentences: involuntary manslaughter (ten years), communicating a threat (three years), wrongful use of cocaine (five years), and wrongful use of marijuana (two years). *MCM* pt. IV, para. 44.e.(2), para. 110.e., para. 37.e.(1) (2016 ed.). Appellant asserts that the "severity of the drug and threat charges paled in comparison to the involuntary manslaughter charge, which from opening statement through findings was the indisputable **[*28]** focus of the Government's case." Brief for Appellant at 44, *United States v. Harrington*, No. 22-0100 (C.A.A.F. Apr. 13, 2022). Essentially, Appellant contends that the Government unfairly argued to the panel that Appellant should receive "at least" fifteen years of confinement for the involuntary manslaughter charge, even though the maximum punishment for involuntary manslaughter is only ten years.

Appellant presented this concern to the military judge when defense counsel requested a panel instruction articulating the maximum punishment for each offense. Defense counsel explained that Appellant was concerned that "the members could be under some type of false impression that they could adjudge [a] 15-year sentence solely for [the involuntary manslaughter charge], which under the law they could not do." Transcript of Record at 1131, *United States v. Harrington* (No. 22-0100). Appellant acknowledged that the panel could still be instructed that it was to adjudge a unitary sentence for all four offenses, but he wanted the panel to understand that involuntary manslaughter, charged on its own, carried a maximum punishment of only ten years and that the other ten years of possible confinement in his case were derived from the other offenses. Further review **[*29]** of the record of trial demonstrates that Appellant's concerns were not unfounded.

At various points in the Government's sentencing argument, trial counsel connected its requested fifteen years of confinement to the involuntary manslaughter charge. For example, after reminding the panel that Appellant shot the victim in the head, trial counsel stated, "The next 15 years the [victim's family] are going to have to live with this and that will never take it away, 15 years is not enough to take away that pain." Transcript of Record at 1138, *United States v. Harrington* (No. 22-0100). Later, trial counsel stated, "The [victim's family] will never see their son. In 15 years that's not going to heal it but it's a start." *Id.* at 1144. And at the conclusion of the Government's argument, trial counsel instructed the members to "think about [the shooting victim] when you go back there and we ask you that you give the accused a dishonorable discharge and at least 15 years in jail." *Id.* at 1145.

In Appellant's view, the military judge's denial of the requested instruction made it impossible for him to explain to the members that—contrary to the impression they might have received from trial counsel's **[*30]** sentencing arguments—the maximum penalty for involuntary manslaughter, standing alone, is only ten years of confinement. Appellant argues that this substantially influenced the sentencing proceedings resulting in the panel unfairly sentencing him to fourteen years of confinement.

The Government did not address prejudice in its brief, but at oral argument the Government argued that Appellant was not prejudiced because his other offenses of conviction were themselves serious and because the sentence ultimately adjudged fell within the range permitted by the *Manual*. Oral Argument at 37:16-39:02, *United States v. Harrington* (C.A.A.F. Oct. 26, 2022) (No. 22-0100). Although these points are true, they do not persuade us that Appellant's sentence was not substantially influenced by the military judge's error.

The Government conceded at oral argument that Appellant could not have lawfully informed the panel of the maximum punishment for involuntary manslaughter in his own sentencing argument. Oral Argument at 39:06-39:14, *United States v. Harrington* (C.A.A.F. Oct. 26, 2022) (No. 22-0100). Accordingly, by denying Appellant's requested instruction, the military judge deprived Appellant of a powerful argument: that the President had deemed even the worst involuntary manslaughters to warrant no more than ten years of confinement. **[*31]** Given the focus placed on the involuntary manslaughter conviction by the Government during sentencing and under the specific facts of this case, we cannot be confident that the military judge's denial of the requested instruction did not substantially influence the adjudged sentence.

2. Unsworn Victim Statement

When this Court finds error in the admission of sentencing matters, the test for prejudice is "'whether the error substantially influenced the adjudged sentence.'" *Edwards, 82 M.J. at 246* (quoting *Barker, 77 M.J. at 384*). The Government bears the burden of showing the error was harmless, but need not show harmlessness beyond a reasonable doubt. *Id.* Generally, this Court considers the four *Barker* factors in making this determination: "'(1) the strength of the Government's case; (2) the strength of the defense case; (3) the materiality of the evidence in question; and (4) the quality of the evidence in question.'" *Id. at 247* (quoting *Barker, 77 M.J. at 384*).[15] We review these four factors de novo. *Id. at 247 n.5*.

Applying the *Barker* factors, the Government contends that Appellant was not prejudiced by the military judge's error in allowing trial counsel to participate in the presentation of the unsworn victim statement. The Government asserts that its sentencing case was strong **[*32]** (Appellant killed a fellow servicemember by shooting him in the head, to say nothing of his other offenses) and the Appellant's case was weak (consisting only of "generic" character letters from family and friends, some "basic" certificates, and an unsworn statement). Brief for Appellee at 54-55, *United States v. Harrington*, No. 22-0100 (C.A.A.F. May 13, 2022). The Government further argues that the unsworn victim statement was neither material nor of high quality because the trial counsel's statements in the question-and-answer exchange with the victim's parents were benign, and that no part of the unsworn victim statements exceeded the substantive limits placed on the content of such statements by R.C.M. 1001(c). All of

[15] Although we apply the *Barker* factors in this case, we note our concern that the *Barker* factors may not allow this Court to adequately assess the prejudice arising from the erroneous admission of sentencing evidence or victim impact statements. *See Edwards, 82 M.J. at 247* (describing the difficulties of applying the *Barker* factors in the sentencing context). In an appropriate case, the Court would be open to considering whether the *Barker* factors should be augmented, or whether they should be replaced by a different analytical standard, when determining whether such errors substantially influenced the adjudged sentence.

this is true. But none of these factors address the primary problem: that trial counsel's participation in the presentation of the unsworn victim statement blurred the important distinction between sentencing evidence presented by the Government and nonevidentiary sentencing matters presented by the victim.

At courts-martial, panel members must sentence the accused based solely on the facts in evidence and the military judge's instructions. *United States v. Frey, 73 M.J. 245, 250 (C.A.A.F. 2014)*; *see also* R.C.M. 502(a)(2) ("the members shall determine an appropriate sentence, based on the evidence and in accordance **[*33]** with the instructions of the military judge"). As noted above, unsworn victim statements are not evidence, but instead fall into the separate category of "sentencing matters" that the Rules for Courts-Martial permit to be presented during sentencing. *Tyler, 81 M.J. at 112-13*. The Military Judges' Benchbook provides the following standard instruction (which was given in this case) to advise panels on how they should treat unsworn statements:

> The weight and significance to be attached to an unsworn statement rests within the sound discretion of each court member. You may consider that the statement is not under oath, its inherent probability or improbability, whether it is supported or contradicted by evidence in the case, as well as any other matter that may have a bearing upon its credibility.

Dep't of the Army, Pam. 27-9, Legal Services, Military Judges' Benchbook ch. 2, § V, para. 2-6-11 (2020).

In this case, the military judge not only erred by allowing trial counsel and the victim's parents to present their unsworn victim statements in a question-and-answer format, but he also permitted those statements to be given from the witness stand. This means of presenting the un-sworn victim statements mimicked the presentation of actual sworn testimony that the panel members would have experienced during the rest of the trial, raising the potential for confusion among the members about the status of the statements. Although this potential confusion might not have prejudiced Appellant on its own, the cumulative effect of this error—combined with the prejudice caused by the military judge's erroneous denial of the requested sentencing instruction—leads us to conclude that the Government failed to meet its burden of demonstrating that the cumulative errors did not have a substantial influence on the adjudged sentence.

III. Conclusion

The decision of the United States Air Force Court of Criminal Appeals is affirmed with respect to the findings but reversed with respect to the sentence. The case is returned to the Judge Advocate General of the Air Force for remand to the Court of Criminal Appeals to either reassess the sentence based on the affirmed findings or order a sentence rehearing.

Concur by: MAGGS (In Part)

Dissent by: MAGGS (In Part)

Dissent

Judge MAGGS, concurring in part and dissenting in part.

For the reasons that I explain below, I would answer the first assigned issue in the affirmative and would answer the second and third assigned issues in the negative. I therefore would affirm the judgment of the United States **[*34]** Air Force Court of Criminal Appeals. *United States v. Harrington, No. ACM 39825, 2021 CCA LEXIS 524, at *4, 2021 WL 4807174, at *2 (A.F. Ct. Crim. App. Oct. 14, 2021)* (unpublished) (affirming the findings and sentence in this case). Accordingly, while I concur in the Court's decision to affirm the findings in this case, I respectfully dissent from the Court's decision to set aside the sentence and to remand the case either for a reassessment of the sentence or for a rehearing on the sentence.

I. Legal Sufficiency

Addressing the first assigned issue, the Court holds that the evidence was legally sufficient for finding Appellant guilty of communicating a threat in violation of *Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934 (2012)*. I concur with the Court's analysis and conclusion. I therefore join part II.A. of the Court's opinion.

II. Sentencing Instruction

Addressing the second assigned issue, the Court holds that the military judge abused his discretion in denying Appellant's request for an instruction on the maximum punishment for each of the offenses of which he was

found guilty because the military judge denied the request based on an incorrect understanding of the law. The Court further holds that this error prejudiced Appellant. I agree in part and disagree in part. In my view, the military judge misunderstood the law, but his error did not prejudice Appellant. **[*35]**

At trial, Appellant requested an instruction informing the members of the maximum possible punishment for each offense of which he was found guilty. The military judge, however, declined to provide the instruction that Appellant requested. The military judge believed that the requested instruction was impermissible, stating that "[m]embers are never instructed on what a specific maximum punishment is for each individual offense." But as the Court properly explains, this Court's precedent says otherwise. This Court held in *United States v. Gutierrez, 11 M.J. 122, 124 (C.M.A. 1981)*, that a military judge has discretion to instruct the members on the maximum punishments authorized for each offense in addition to the maximum total punishment. The Court holds that the military judge abused his discretion in denying Appellant's request because the military judge's understanding of the law was erroneous. Having found an abuse of discretion, the Court then determines that relief is warranted because the Court cannot be confident that the military judge's denial of the requested instruction did not substantially influence the adjudged sentence.

In my view, the Court's prejudice analysis omits an important step. Before addressing the question of whether **[*36]** the requested instruction might have substantially influenced the sentence if it had been given, we first must consider whether the military judge would have provided the instruction *if he had properly understood the law*. For if we are confident that the military judge would not have provided the instruction (and that he was not required to provide the instruction), then we can also be confident that the military judge's misunderstanding of the law did not "substantially influence[] the sentence proceedings." *United States v. Rush, 54 M.J. 313, 315 (C.A.A.F. 2001)*.

In rejecting Appellant's request, the military judge explained:

> What the law allows for [the members] to consider is an appropriate punishment that they believe is appropriate at the time that it's adjudged that falls underneath the maximum punishment authorized by law. There's no requirement that I'm aware of in the law that the members must give more weight to one offense over another offense or less weight to one offense over another offense simply based on a maximum punishment theory. Members are never instructed on what a specific maximum punishment is for each individual offense. It's under our unitary principle. They're always just told here's the maximum and they are at **[*37]** liberty to decide that either the maximum or no punishment is appropriate in light of all of the offenses in the case. And, so, the court is loathe[] to give them any kind of direction that interferes with their ability, their independent ability, to decide an appropriate sentence in this case based on their interpretation of the evidence, matters in aggravation and the matters in mitigation, as long as that sentence falls underneath the maximum punishment. That's what the law allows them to do and . . . again, there's no requirement to clarify for them what maximum punishments are authorized for what offenses.

This explanation reveals that the military judge's mistaken belief that the "[m]embers are never instructed on what a specific maximum punishment is for each individual offense" was not the only reason that he denied the requested instruction. The military judge expressed three other reasons. First, the military judge was concerned that the requested instruction might cause "the members [to] give more weight to one offense over another offense or less weight to one offense over another offense simply based on a maximum punishment theory." Second, the military judge understood **[*38]** that "there's *no requirement* to clarify for [the members] what maximum punishments are authorized for what offenses." (Emphasis added.) Third, the military judge believed that the instruction would "interfere[] with [the members'] ability, their independent ability, to decide an appropriate sentence in this case based on their interpretation of the evidence, matters in aggravation and the matters in mitigation, as long as that sentence falls underneath the maximum punishment." Because the military judge stated these three additional reasons for denying the requested instruction, I am confident that the military judge would not have given the instruction even if he had not been mistaken about his discretion to provide it.

I further do not believe that in such circumstances the military judge would have abused his discretion by not providing the instruction. The military judge understood defense counsel's reason for seeking the instruction: defense counsel did not want the panel to give too much weight to the manslaughter offense. But the military judge believed that this consideration was outweighed

by the other considerations, which the military judge clearly articulated on the record. **[*39]** This decision, in my view, fell well within the military judge's range of reasonable choices.

My reasoning here is similar to the reasoning that the Court used in *United States v. Rasnick, 58 M.J. 9 (C.A.A.F. 2003)*. In that case, the military judge declined to give a permissible sentencing instruction because he mistakenly believed that the instruction was impermissible. *Id. at 10*. This was an abuse of discretion because the military judge misunderstood the law. *Id.* But even so, the Court denied relief because it concluded that the instruction was not required under the circumstances, even though it was permissible. *Id.* The Court therefore did not reach the question of whether the result might have been different if the instruction had been given.

The same is true here. Even if the military judge had believed that the requested instruction was permissible, he would not have given it, and his decision not to give it would not have been an abuse of discretion. Accordingly, no prejudice occurred.

III. Unsworn Crime Victim Statements

Addressing the third assigned issue, the Court holds that the military judge erred in two ways. One was by allowing the victim's parents to make their unsworn crime victim statements from the witness stand. The other was **[*40]** by allowing them to present their crime victim statements in a question-and-answer format with trial counsel asking them the questions. The Court further determines that these errors prejudiced Appellant.

In my view, the military judge in this case did not abuse his discretion by allowing the victim's parents to present their unsworn statements from the witness stand for several related reasons. First, the Rules for Courts-Martial (R.C.M.) contain no express prohibition against making un-sworn statements from the witness stand. If a crime victim chooses to exercise his or her right to be heard at sentencing by making an unsworn statement, R.C.M. 1001(c)(1) simply provides that "the crime victim shall be called by the court-martial." The rule says nothing about the location in the courtroom from which the crime victim, when called, shall make the statement. Second, R.C.M. 1001(c)(1) expressly protects a crime victim's "right to be reasonably heard." The military judge, in his discretion, could reasonably conclude that the witness stand was a proper place in the courtroom for the victim's parents to give their statements because it was a place from which they could be conveniently seen and heard by the members, by the military **[*41]** judge, by the court-reporter, by the accused, by the trial and defense counsel, and by those in the courtroom gallery. Third, throughout the long history of the military justice system under the Uniform Code of Military Justice, accused have made unsworn statements from the witness stand, and no cases have said that this practice is improper. *See* John S. Reid, *Undoing the Unsworn: The Un-sworn Statement's History and A Way Forward*, *79 A.F. L. Rev. 121, 157 (2018)* (noting that it is "common" for the accused to "give an unsworn statement from the witness stand, often in a question-and-answer format with their defense attorney" and that "[m]ilitary appellate courts have not provided case law on whether a judge may disallow such a practice"). I see no strong reason that victims cannot also follow this practice. Fourth, a victim usually does not have the option of making an unsworn statement from a table because, unlike an accused who sometimes speaks from the trial defense counsel's table, courtrooms typically do not have tables for victim's counsel. Finally, the military judge in this case took a reasonable step to prevent any possible confusion about the distinction between a sworn and unsworn statement by providing **[*42]** the following instruction to the members:

> Members of the Court, at this time you will hear some unsworn statements from individuals that are identified as victims of the crime. I want to read you a brief instruction though as to how you can consider these particular statements. An unsworn statement is an authorized means for [a] victim to bring information to the attention of the court and must be given appropriate consideration. The victim cannot be cross-examined by the prosecution or defense or interrogated by court members, or me, upon an unsworn statement but the parties may offer evidence to rebut statements of fact contained in it. The weight and significance to be attached to an unsworn statement rests within the sound discretion of each court member. You may consider that the statement is not under oath, its inherent probability or improbability, whether it is supported or contradicted by evidence in the case, as well as any other matter that may have a bearing upon its credibility. In weighing an unsworn statement, you are expected to use your common sense and your knowledge of human nature and the ways of the world.

In addition, in my view, the military judge also did not **[*43]** abuse his discretion in allowing the victim's

parents to present their unsworn statements by answering questions asked by trial counsel. R.C.M. 1001(c)(5)(A) places only three restrictions on questioning a crime victim when the crime victim makes an unsworn statement: (1) the crime victim "may not be *cross-examined* by trial counsel"; (2) the crime victim "may not be *cross-examined* by . . . defense counsel; and (3) the crime victim "may not be . . . *examined* upon [the unsworn statement] by the court-martial." (Emphasis added.) None of these three restrictions was violated. Restrictions (2) and (3) do not concern trial counsel, and restriction (1) prohibits only *cross-examination* by trial counsel. Cross-examination is the "questioning of a witness at a trial or hearing by the party opposed to the party in whose favor the witness has testified." *Black's Law Dictionary* 474 (11th ed. 2019). If the crime victim voluntarily decides to present the unsworn statement in a question-and-answer format, I can see no way to construe that as being "cross-examined by trial counsel." That said, if the President desires to prevent all questioning of the crime victim, the President could easily replace the current ban on **[*44]** "cross-examination" by trial counsel with a broader ban on any "examination" by trial counsel—as the President already has done by prohibiting any examination by the court-martial.

And as mentioned previously, R.C.M. 1001(c)(1) protects the victim's right to be reasonably heard. In my view, the military judge properly exercised his discretion in concluding that a question-and-answer format was one way to effectuate this right in this case. The military judge explained on the record that a question-and-answer format was not contrary to R.C.M. 1001(c) and that this format "provides a greater sense of control in the sense that the government can control the questions, raise and reorient . . . the individual providing the unsworn statement" to ensure the statement covered only permissible subjects.

The Court cites the principle that "an unsworn victim statement belongs solely to the victim." I agree that trial counsel cannot make the crime victim's statement for the victim in the way that R.C.M. 1001(d)(2)(C) allows defense counsel to make an unsworn statement on behalf of the accused. "[T]he right to make an unsworn victim statement belongs solely to the victim or to the victim's designee and not to trial counsel." *United States v. Edwards, 82 M.J. 239, 245 (C.A.A.F. 2022)*. But when reviewing **[*45]** the participation of trial counsel in the unsworn statement of a crime victim the question is "to whom should we attribute [the] message?" *Id. at 246*.

The clear answer in this case is the victim's parents. Trial counsel solicited the statements of the victim's parents with broad, open-ended questions: "How did Marcus feel about being stationed so close to home?" "How did you learn about the incident involving Marcus on 5 July?" "Has your family dynamic changed since Marcus hasn't been there?" Trial counsel's open-ended questions often prompted lengthy responses from the victim's parents. No one could reasonably attribute the responses of the victim's parents to trial counsel.

Finally, this case is distinguishable from *Edwards*. In that case, trial counsel helped crime victims to make a video that contained pictures and music, thus violating the express requirement in R.C.M. 1001(c)(5)(A) that a victim impact statement must be only "oral or written." *82 M.J. at 244* (internal quotation marks omitted). It is true that in *Edwards* "the video also included two clips of the victim's parents answering questions." *Id. at 242*. But the inclusion of these questions was not one of the grounds on which this Court held that the unsworn victim statement **[*46]** was improper.

IV. Conclusion

For the foregoing reasons, unlike the Court, I would not set aside the sentence in this case. I therefore would affirm the decision of the United States Air Force Court of Criminal Appeals.

End of Document

In re A.L.

United States Air Force Court of Criminal Appeals

December 7, 2022, Decided

Misc. Dkt. No. 2022-12

Reporter
2022 CCA LEXIS 702 *; 2022 WL 17484780

In re A.L., Petitioner

Subsequent History: Review granted by, in part, Review denied by, in part, Request granted, Request denied by *A.L. v. United States, 2023 CAAF LEXIS 175 (C.A.A.F., Feb. 28, 2023)*

Case Summary

Overview

HOLDINGS: [1]-Petitioner, an alleged victim of the charged offenses in the court-martial, had not clearly and indisputably demonstrated the prosecution unlawfully obtained her medical records from the military treatment facility in violation of her constitutional, statutory, or other privacy rights; [2]-Assuming for purposes of argument that the prosecution did improperly obtain petitioner's records, the court was not persuaded that the military judge clearly and indisputably erred by analyzing the defense's motion to compel as a matter of discovery under R.C.M. 701 rather than a matter of production under R.C.M. 703; [3]- Petitioner, however, had clearly and indisputably demonstrated she was entitled to relief with respect to Mil. R. Evid. 513 and the Family Advocacy Program records.

Outcome

Petition for extraordinary relief in the nature of a writ of mandamus granted in part and denied in part.

LexisNexis® Headnotes

Military & Veterans Law > Military Justice > Judicial Review > Extraordinary Writs

HN1[] **Judicial Review, Extraordinary Writs**

The All Writs Act, 28 U.S.C.S. § 1651(a), grants a Court of Criminal Appeals authority to issue extraordinary writs necessary or appropriate in aid of its jurisdiction. The purpose of a writ of mandamus is to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so. In order to prevail on a petition for a writ of mandamus, the petitioner must show that: (1) there is no other adequate means to attain relief; (2) the right to issuance of the writ is clear and indisputable; and (3) the issuance of the writ is appropriate under the circumstances. A writ of mandamus is a drastic instrument which should be invoked only in truly extraordinary situations.

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Actions by Convening Authority

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Posttrial Sessions

Military & Veterans Law > ... > Courts Martial > Pretrial Proceedings > Investigations

HN2[] **Posttrial Procedure, Actions by Convening Authority**

Unif. Code Mil. Justice art. 6b, 10 U.S.C.S. § 806b, refers to the rights of victims of offenses under the UCMJ, including at pretrial, trial, and post-trial phases of court-martial proceedings.

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Actions by Convening Authority

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Posttrial Sessions

HN3 **Posttrial Procedure, Actions by Convening Authority**

Unif. Code Mil. Justice art. 6b, 10 U.S.C.S. § 806b, provides that the victim of an offense under the UCMJ has, among other rights, the right to be treated with fairness and with respect for the dignity and privacy of the victim.

Military & Veterans Law > Military Justice > Disclosure & Discovery > Disclosure by Government

Military & Veterans Law > Military Justice > Disclosure & Discovery > Discovery by Defense

Military & Veterans Law > ... > Witnesses > Compulsory Attendance of Witnesses > Interrogation & Presentation

Military & Veterans Law > ... > Trial Procedures > Witnesses > Examination of Witnesses

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Judge Advocate Review

HN4 **Disclosure & Discovery, Disclosure by Government**

In general, disclosure to the defense of documents in the possession of the prosecution is governed by R.C.M. 701, Manual Courts-Martial, whereas production to the defense of documents not in the possession, custody, or control of military authorities is governed by R.C.M. 703, Manual Courts-Martial. Each party shall have adequate opportunity to prepare its case and equal opportunity to interview witnesses and inspect evidence. R.C.M. 701(e), Manual Courts-Martial. After service of charges, upon request of the defense, the Government shall permit the defense to inspect any papers, documents, or data if the item is within the possession, custody, or control of military authorities and the item is relevant to defense preparation. R.C.M. 701(a)(2)(A)(i). R.C.M. 703(e)(1) provides that, in general, each party is entitled to the production of evidence which is relevant and necessary.

Business & Corporate Compliance > ... > Healthcare Law > Medical Treatment > Patient Confidentiality

HN5 **Medical Treatment, Patient Confidentiality**

A covered entity may use or disclose protected health information without the individual's authorization or opportunity to object to the extent that such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law. 45 C.F.R. § 164.512(a)(1).

Military & Veterans Law > ... > Witnesses > Compulsory Attendance of Witnesses > Interrogation & Presentation

Military & Veterans Law > ... > Evidence > Privileged Communications > Psychotherapist-Patient Privilege

Military & Veterans Law > ... > Evidence > Admissibility of Evidence > Sex Offenses

Military & Veterans Law > ... > Courts Martial > Evidence > Preliminary Questions

HN6 **Compulsory Attendance of Witnesses, Interrogation & Presentation**

The patient must be afforded a reasonable opportunity to attend the hearing and be heard. Mil. R. Evid. 513(e)(2). The military judge may examine the evidence or a proffer thereof in camera, if such examination is necessary to rule on the production or admissibility of protected records or communications. Mil. R. Evid. 513(e)(3). Mil. R. Evid. 514 provides a similar privilege and procedures with respect to confidential communications between an alleged victim and a victim advocate made for the purpose of facilitating advice or assistance to the alleged victim. Mil. R. Evid. 514(a).

Military & Veterans Law > Military Justice > Judicial Review > Extraordinary Writs

Military & Veterans Law > Military Justice > Judicial Review > Finality

Military & Veterans Law > Military Justice > Apprehension & Restraint of Civilians & Military Personnel > Unlawful Restraint

HN7 **Judicial Review, Extraordinary Writs**

It's a fundamental canon of statutory construction that words generally should be interpreted as taking their ordinary meaning at the time Congress enacted the statute. In *Unif. Code Mil. Justice art. 6b(e), 10 U.S.C.S. § 806b(e)*, Congress specified that a victim may seek a writ of mandamus from the Court of Criminal Appeals. Giving effect to the plain meaning of the words of the statute and the longstanding standard for a petitioner to secure mandamus relief, petitioner bears the burden to demonstrate: (1) there is no other adequate means to attain relief; (2) the right to issuance of the writ is clear and indisputable; and (3) the issuance of the writ is appropriate under the circumstances.

Constitutional Law > Substantive Due Process > Privacy > Personal Information

HN8 **Privacy, Personal Information**

A right to privacy is not absolute and must be weighed against the Government's interest in obtaining the records in particular circumstances.

Business & Corporate Compliance > ... > Medical Treatment > Patient Confidentiality > Medical Records Under HIPAA

Military & Veterans Law > Military Justice > Disclosure & Discovery > Disclosure by Government

Military & Veterans Law > Military Justice > Disclosure & Discovery > Discovery by Defense

Military & Veterans Law > ... > Courts Martial > Pretrial Proceedings > Investigations

HN9 **Patient Confidentiality, Medical Records Under HIPAA**

HIPAA permits disclosure of protected health information without the individual's consent or opportunity to object to the extent that such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law. *45 C.F.R. § 164.512(a)(1)*. DoDM 6025.18, implementing HIPAA within the DoD, permits certain disclosures for law enforcement purposes, including pursuant to an administrative request that is authorized by law, provided the information sought is relevant and material to a legitimate law enforcement inquiry; the request is in writing, specific, and limited in scope; and de-identified information could not reasonably be used. Dep't Def. Directive 6025.18 ¶ 4.4.f.(1)(b)3. Unif. Code Mil. Justice art. 46(a), 10 U.S.C.S. § 846b, provides trial counsel shall have the opportunity to obtain evidence in accordance such regulations as the President may prescribe. R.C.M. 703(g)(2), Manual Courts-Martial provides trial counsel may obtain evidence under the control of the Government simply by notifying the custodian of the evidence of the time, place, and date the evidence is required and requesting the custodian to send or deliver the evidence.

Military & Veterans Law > ... > Witnesses > Compulsory Attendance of Witnesses > Interrogation & Presentation

Military & Veterans Law > ... > Evidence > Privileged Communications > Psychotherapist-Patient Privilege

HN10 **Compulsory Attendance of Witnesses, Interrogation & Presentation**

Mil. R. Evid. 513(a) generally provides a patient a privilege to refuse to disclose and to prevent any other person from disclosing subject communications between the patient and psychotherapist or assistant. Certain enumerated exceptions exist, and the Courts of Criminal Appeals have suggested the continuing existence of a non-enumerated constitutionally required exception. However, before a military judge orders the production or admission of evidence of a patient's records or communication, the military judge must conduct a hearing, which shall be closed, where the patient must be afforded a reasonable opportunity to attend and be heard. Mil. R. Evid. 513(e)(2).

Military & Veterans Law > ... > Evidence > Admissibility of Evidence > Admissions & Confessions

Military & Veterans
Law > ... > Evidence > Privileged Communications > Psychotherapist-Patient Privilege

Military & Veterans
Law > ... > Witnesses > Compulsory Attendance of Witnesses > Interrogation & Presentation

HN11[] **Admissibility of Evidence, Admissions & Confessions**

The core privilege established by Mil. R. Evid. 513(a) broadly empowers a patient to prevent any disclosure from one person to another, and the military judge's ruling purported to compel such a disclosure. Mil. R. Evid. 513(e) provides the procedure that must be followed when a party seeks to discover information pursuant to any of the enumerated exceptions.

Opinion

[*1] ORDER

Special Panel

On 21 October 2022, pursuant to *Article 6b, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 806b*, and Rule 19 of the Joint Rules of Appellate Procedure for Courts of Criminal Appeals, Petitioner requested this court issue a stay of proceedings and a writ of mandamus in the pending court-martial of *United States v. Captain Theodore J. Slusher*. Petitioner is an alleged victim of charged offenses in the court-martial. On 24 October 2022, this court granted a stay of proceedings and ordered counsel for the Government and counsel for Captain Slusher (the Accused) to submit briefs in response to the petition. On 8 November 2022, the Government and the Defense submitted responsive briefs with certain attached documents. On 15 November 2022, Petitioner submitted a reply to the Government's response brief, and on 21 November 2022 Petitioner submitted a timely reply to the Defense's response brief.[1]

Having considered the petition, the responsive briefs, Petitioner's reply briefs, and the matters attached thereto, we grant the petition in part and deny it in part as specified below.

I. Background

The petition, responsive briefs, and reply briefs, with their several attachments, establish the following sequence of events.

On 4 May 2022, the convening authority referred for trial one charge and four specifications of violations **[*2]** of *Article 120, UCMJ, 10 U.S.C. § 920*; one charge and one specification of a violation of *Article 120c, UCMJ, 10 U.S.C. § 920c*; one charge and six specifications of violations of Article 128, UCMJ, *10 U.S.C. § 928*; and one charge and one specification of a violation of Article 134, UCMJ, *10 U.S.C. § 934*.

On 17 May 2022, trial defense counsel sent an initial discovery request to trial counsel, requesting production of, *inter alia*, "[a]ny relevant personnel, medical, and mental health records of any complaining witness . . . to include records in the possession of the Family Advocacy Program (FAP) . . . ." On 13 June 2022, the Defense sent a second discovery request to the Government.

On 16 June 2022, assistant trial counsel submitted a "Memorandum for Release of Healthcare Information" to a military treatment facility (MTF) located on Fort Bragg, North Carolina, requesting "all of [Petitioner]'s medical records for the period from 1 November 2017 - 16 May 2020." The memorandum asserted the "information sought [was] relevant and material to a legitimate law enforcement inquiry" and that examination of the records was "required as part of an official investigation."

On 27 June 2022, the MTF records custodian responded to assistant trial counsel's request and provided 575 pages of medical records, including 42 pages of **[*3]** FAP records.

On 21 September 2022, trial defense counsel filed a motion to compel production of, *inter alia*, "[a]ll of [Petitioner]'s medical records maintained by [Petitioner]' s unit," as well as mental health records.

On 2 October 2022, the Government submitted its response to the motion to compel, wherein trial counsel stated the Government had obtained Petitioner's "medical file from 1 November 2017 (earliest date of

[1] Petitioner's deadline to file a reply to the Defense's brief was extended due to an error in the service of the Defense's response brief.

specifications) through 16 May 2020 (3 months following last alleged specification)." Trial counsel further stated the Government was preparing a redacted copy of the records for review by Petitioner's victims' counsel and, "if necessary," in camera review by the military judge. Trial counsel intended to leave unredacted those portions of the records relating to injuries to Petitioner's wrist allegedly caused by the Accused, "materials relating to consultations in which abuse is alleged," and "sufficient information to identify dates and locations of instances that [Petitioner] otherwise received medical consultations."

On 4 October 2022, the military judge held a hearing on the motion to compel. At the hearing, trial counsel restated that the Government was in possession **[*4]** of Petitioner's medical records, to include FAP records, and trial counsel had reviewed both sets of records. Trial counsel told the military judge that portions of Petitioner's medical records were "relevant" to the Defense's discovery request. According to a subsequent declaration by Major (Maj) DC, the detailed special trial counsel representing the Government at the hearing, Petitioner asserted through her counsel that the FAP records contained materials privileged under Military Rule of Evidence (Mil. R. Evid.) 513. According to Maj DC, Petitioner did not assert the non-FAP medical records contained Mil. R. Evid. 513 material, or that any of the records contained material privileged under Mil. R. Evid. 514. Petitioner's counsel requested the military judge conduct an in camera review of the records to determine their relevance.

On 11 October 2022, the military judge issued a written ruling ordering the Government to provide all 575 pages of Petitioner's medical records to the Defense, without in camera review. The military judge explained:

> Government counsel acknowledged during the motions hearing that portions of the medical records are relevant in response to the defense discovery request and the [G]overnment had no objection to turning the records over **[*5]** to defense counsel.
> . . . .
> This court finds that the defense counsel has met their burden to show the information sought exists and is material to the preparation of the defense. [Petitioner's] counsel has requested that the Court review the medical records and FAP records in camera to determine relevancy. However, here, where the [G]overnment has reviewed the records, acknowledged the material is relevant, and has had the full benefit of reviewing the material, this Court finds that the [D]efense should not be denied the same opportunity of access. . . .
>
> Wherefore, the Defense Motion to Compel Discovery is **GRANTED**. The [G]overnment shall turn over [Petitioner's] medical records and the FAP records in their position [sic]. Before doing so, I am instructing the [G]overnment to redact the appropriate personally identifiable information in the records
> . . . .

The military judge denied a request by Petitioner's counsel to file a motion for reconsideration. In subsequent communications, the military judge clarified that the Prosecution was to turn over all of Petitioner's FAP records currently in its possession, and that the military judge would not perform an in camera review.

On 12 October **[*6]** 2022, Petitioner's counsel moved the trial court for a stay of proceedings and a protective order. On 13 October 2022, the military judge denied the motion to stay proceedings, but issued a protective order limiting the disclosure of the records in question to the Prosecution, defense counsel, expert consultants, Petitioner, and Petitioner's counsel. Eight days later, Petitioner filed the request for this court to issue a stay of proceedings and a writ of mandamus.

In addition to the stay of proceedings, which we previously granted, Petitioner has requested this court (1) vacate the military judge's ruling with respect to the 21 September 2022 defense motion to compel discovery; and (2) order the copies of the subject medical and FAP records be destroyed or, in the alternative, order the military judge to conduct in camera review "that will apply the standards of relevance and afford protections of Mil. R. Evid. 513 and [Mil. R. Evid.] 514."

II. LAW

HN1[↑] The *All Writs Act*, *28 U.S.C. § 1651(a)*, grants a Court of Criminal Appeals "authority to issue extraordinary writs necessary or appropriate in aid of its jurisdiction." *Chapman v. United States, 75 M.J. 598, 600 (A.F. Ct. Crim. App. 2016)* (citing *Loving v. United States, 62 M.J. 235, 246 (C.A.A.F. 2005)*). The purpose of a writ of mandamus is to "confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel **[*7]** it to exercise its authority when it is its duty to do so." *Roche v. Evaporated Milk Ass'n, 319 U.S. 21,*

26, 63 S. Ct. 938, 87 L. Ed. 1185 (1943) (citations omitted). In order to prevail on a petition for a writ of mandamus, the petitioner "must show that: (1) there is no other adequate means to attain relief; (2) the right to issuance of the writ is clear and indisputable; and (3) the issuance of the writ is appropriate under the circumstances." Hasan v. Gross, 71 M.J. 416, 418 (C.A.A.F. 2012) (citing Cheney v. United States Dist. Court, 542 U.S. 367, 380-81, 124 S. Ct. 2576, 159 L. Ed. 2d 459 (2004)). A writ of mandamus "is a 'drastic instrument which should be invoked only in truly extraordinary situations.'" Howell v. United States, 75 M.J. 386, 390 (C.A.A.F. 2016) (quoting United States v. Labella, 15 M.J. 228, 229 (C.M.A. 1983)).

Article 6b(e)(1), UCMJ, 10 U.S.C. § 806b(e)(1), states:

> If the victim[2] of an offense under this chapter believes that . . . a court-martial ruling violates the rights of the victim afforded by a section (article) or rule specified in paragraph (4), the victim may petition the Court of Criminal Appeals for a writ of mandamus to require the . . . court-martial to comply with the section (article) or rule.

Article 6b(e)(4), UCMJ, provides that this right to petition the Court of Criminal Appeals for a writ of mandamus applies with respect to protections afforded by, *inter alia*, Article 6b, UCMJ; Mil. R. Evid. 513; and Mil. R. Evid. 514.

HN3[↑] Article 6b(a), UCMJ, provides that the victim of an offense under the UCMJ has, among other rights, "[t]he right to be treated with fairness and with respect for the dignity and privacy of the victim . . . ."

[*8] **HN4**[↑] In general, disclosure to the defense of documents in the possession of the prosecution is governed by Rule for Courts-Martial (R.C.M.) 701, whereas production to the defense of documents not in the possession, custody, or control of military authorities is governed by R.C.M. 703. *See* United States v. Bishop, 76 M.J. 627, 634 (A.F. Ct. Crim. App. 2017); *see also* United States v. Stellato, 74 M.J. 473, 481 (C.A.A.F. 2015) (citing R.C.M. 701(a)(2)(A)). "Each party shall have adequate opportunity to prepare its case and equal opportunity to interview witnesses and inspect evidence . . . ." R.C.M. 701(e). "After service of charges, upon request of the defense, the Government shall permit the defense to inspect any . . . papers, documents, [or] data . . . if the item is within the possession, custody, or control of military authorities and [ ] the item is relevant to defense preparation." R.C.M. 701(a)(2)(A)(i). R.C.M. 703(e)(1) provides that, in general, "[e]ach party is entitled to the production of evidence which is relevant and necessary."

HN5[↑] "A covered entity may use or disclose protected health information [without the individual's authorization or opportunity to object] to the extent that such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law." 45 C.F.R. § 164.512(a)(1).

Department of Defense Manual (DoDM) 6025.18, *Implementation of the Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule in DoD Health Care Programs* (13 Mar. 2019), provides procedures for Department of Defense (DoD) compliance with the privacy regulations adopted under HIPAA, Public Law 104-191, including at 45 C.F.R. § 164. DoDM 6025.18 ¶ 4.4.f.(1)(b)3 provides:

> A DoD covered entity may disclose [protected health information] [i]n compliance with, and as limited by, the relevant requirements of . . . [a]n administrative request, including an administrative subpoena or summons, a civil or an authorized investigative demand, or similar process authorized under law, if: [t]he information sought is relevant and material to a legitimate law enforcement inquiry[;] [t]he request is in writing, specific, and limited in scope to the extent reasonably practicable in light of the purpose for which the **[*9]** information is sought[; and] [d]eidentified information could not reasonably be used.

Article 46(a), UCMJ, 10 U.S.C. § 846(a), provides: "In a case referred for trial by court-martial, the trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe." R.C.M. 703(g)(2) provides: "Evidence under the control of the Government may be obtained by notifying the custodian of the evidence of the time, place, and date the evidence is required and requesting the custodian to send or deliver the evidence."

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[2] **HN2**[↑] Article 6b, UCMJ, refers to the rights of "victims" of offenses under the UCMJ, including at pretrial, trial, and post-trial phases of court-martial proceedings. The use of the term "victim" in this order reflects no determination or implication on the court's part as to the merits of the charged offenses in the Accused's court-martial.

Mil. R. Evid. 513(a) provides that, in general:

> A patient has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made between the patient and a psychotherapist or an assistant to the psychotherapist, in a case arising under the [UCMJ], if such communication was made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition.

"Before ordering the production or admission of evidence of a patient's records or communication, the military judge must conduct a hearing, which shall be closed. . . . HN6[] The patient must be afforded a reasonable opportunity **[*10]** to attend the hearing and be heard." Mil. R. Evid. 513(e)(2). "The military judge may examine the evidence or a proffer thereof in camera, if such examination is necessary to rule on the production or admissibility of protected records or communications." Mil. R. Evid. 513(e)(3). Mil. R. Evid. 514 provides a similar privilege and procedures with respect to confidential communications between an alleged victim and a victim advocate "made for the purpose of facilitating advice or assistance to the alleged victim." Mil. R. Evid. 514(a).

III. Analysis

The petition, responsive briefs, and Petitioner's replies require us to address three distinct issues: (1) whether an alleged victim's petition under Article 6b, UCMJ, must meet the usual standard of review for a petition for a writ of mandamus, or the lower standard of demonstrating the military judge abused his discretion; (2) whether Petitioner is entitled to relief based on her right to be treated with fairness and respect for her dignity and privacy under Article 6b(a), UCMJ; and (3) whether Petitioner is entitled to relief with respect to the privileges afforded by Mil. R. Evid. 513 or Mil. R. Evid. 514.

A. Standard of Review

Petitioner contends this court should apply the ordinary standard of appellate review for a military judge's ruling regarding discovery: abuse of discretion. *See* **[*11]** *Stellato, 74 M.J. at 480*. The Government and Defense contend the appropriate standard is the three-part test for relief the United States Court of Appeals for the Armed Forces (CAAF) applied in *Hasan*, including Petitioner's burden to demonstrate her entitlement to relief is "clear and indisputable." *71 M.J. at 418* (citation omitted). We find the standard for mandamus relief articulated in *Hasan* applies.

Petitioner notes that the version of the Crime Victims' Rights Act (CVRA) codified at *18 U.S.C. § 3771* and in effect prior to 2015 contained a provision analogous to *Article 6b(e)(1), UCMJ*, which enabled a crime victim who was denied relief in district court to "petition the court of appeals for a writ of mandamus." *18 U.S.C. § 3771(d)(3)*. Petitioner further notes there was a split among the federal circuits regarding whether to apply the usual strict standards for mandamus relief in the context of appellate review of a district court's ruling on rights under the CVRA. *Compare, e.g., In re Dean, 527 F.3d 391, 394 (5th Cir. 2008)* (applying usual mandamus standards to CVRA appeal); *In re Antrobus, 519 F.3d 1123, 1130 (10th Cir. 2008)* (same); *with Kenna v. United States Dist. Court, 435 F.3d 1011, 1017 (9th Cir. 2006)* (declining to apply usual mandamus standards); *In re W.R. Huff Asset Mgmt. Co., 409 F.3d 555, 562-63 (2d Cir. 2005)* (same). Petitioner argues the specific provision for mandamus review in Article 6b, UCMJ, is authority independent of this court's power under the *All Writs Act* upon which the United States Supreme Court's decision in *Cheney, 542 U.S. at 380-81*, and **[*12]** by extension the CAAF's decision in *Hasan*, were based. Therefore, she reasons, because Article 6b, UCMJ, does not specify a particular standard of review, the ordinary standards of appellate review should apply.

We are not persuaded. In May 2015, Congress revised *18 U.S.C. § 3771(d)(3)* to add the following sentence regarding appeals of CVRA-related decisions: "In deciding such application, the court of appeals shall apply ordinary standards of appellate review." However, when Congress subsequently codified in *Article 6b(e), UCMJ*, a victim's right to petition the Court of Criminal Appeals for a writ of mandamus in November 2015, it did not mirror the language in the CVRA specifying "ordinary standards of appellate review;" nor have subsequent changes to the article inserted equivalent language. The implication is that Congress has provided different standards of review for *18 U.S.C. § 3771(d)(3)* and *Article 6b(e), UCMJ*.

HN7[] "[I]t's a 'fundamental canon of statutory construction' that words generally should be 'interpreted as taking their ordinary . . . meaning . . . at the time Congress enacted the statute.'" *New Prime Inc. v. Oliveira, ___ U.S. ___, 139 S. Ct. 532, 539, 202 L. Ed. 2d 536 (2019)* (alteration and omissions in original)

(quoting Wisconsin Central Ltd. v. United States, 138 S. Ct. 2067, 2074, 201 L. Ed. 2d 490 (2018)). In Article 6b(e), UCMJ, Congress specified that a victim may seek a "writ of mandamus" from the Court of Criminal Appeals. Giving effect to the plain **[*13]** meaning of the words of the statute and the longstanding standard for a petitioner to secure mandamus relief, we conclude Petitioner bears the burden to demonstrate: "(1) there is no other adequate means to attain relief; (2) the right to issuance of the writ is clear and indisputable; and (3) the issuance of the writ is appropriate under the circumstances." Hasan, 71 M.J. at 418 (citation omitted); *see also* In re HK, Misc. Dkt. No. 2021-07, 2021 CCA LEXIS 535, at *3 (A.F. Ct. Crim. App. 13 Sep. 2021) (order) (following Hasan and applying the usual standard for mandamus relief to a petition filed pursuant to Article 6b(e), UCMJ).

B. *Article 6b(a), UCMJ*, Right to Fairness and Respect for Dignity and Privacy

Petitioner asserts the military judge's ruling on the Defense's motion to compel violated her right to respect for her privacy under Article 6b(a), UCMJ. She contends the military judge ignored the fact that the Government unlawfully obtained her records, and the military judge erred by analyzing the motion as a matter of discovery under R.C.M. 701 rather than a matter of production under R.C.M. 703. Petitioner contends that the assistant trial counsel's 16 June 2022 memorandum to the MTF record custodian was inadequate authority for release of her records to the Prosecution, and that a court order or subpoena was required. She further contends that, although at the motion hearing **[*14]** she agreed with the Government that a portion of her records should be released to the Defense, the military judge's ruling that the Defense should receive all 575 pages of the records in trial counsel's possession without in camera review was improper. We find Petitioner has not demonstrated she is clearly and indisputably entitled to relief with respect to her Article 6b(a), UCMJ, right to respect for her privacy.[3]

As an initial matter, Petitioner asserts that she has a constitutional right to privacy that encompasses her confidential medical information. *See* Doe v. Southeastern Pa. Transp. Auth., 72 F.3d 1133, 1137 (3d Cir. 1995) (interpreting Whalen v. Roe, 429 U.S. 589, 599-600, 97 S. Ct. 869, 51 L. Ed. 2d 64 (1977)); A.L.A. v. West Valley City, 26 F.3d 989, 990 (10th Cir. 1994) (citations omitted). ***HN8***[↑] However, such a right is not absolute and "must be weighed against the [G]overnment's interest in obtaining the records in particular circumstances." In re Grand Jury Subpoena, 197 F. Supp. 2d 512, 514 (E.D. Va. 2002) (citing Whalen, 429 U.S. at 602; Doe, 72 F.3d at 1138). Petitioner does not assert that HIPAA, its implementing regulations, or DoDM 6025.18, which govern access to protected health information, are unconstitutional in this respect. Accordingly, for purposes of our analysis of Petitioner's entitlement to relief under the "clear and indisputable" standard, we presume that government compliance with these directives would be sufficient to safeguard Petitioner's constitutional privacy interest in her medical **[*15]** records.

HN9[↑] HIPAA permits disclosure of protected health information without the individual's consent or opportunity to object "to the extent that such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law." 45 C.F.R. § 164.512(a)(1). DoDM 6025.18, implementing HIPAA within the DoD, permits certain disclosures for "law enforcement purposes," including pursuant to an "administrative request" that is "authorized by law," provided the information sought is "relevant and material to a legitimate law enforcement inquiry;" the "request is in writing, specific, and limited in scope;" and "[d]e-identified information could not reasonably be used." DoDM 6025.18 ¶ 4.4.f.(1)(b)3. Article 46(a), UCMJ, provides trial counsel "shall have" the "opportunity to obtain . . . evidence in accordance such regulations as the President may prescribe." R.C.M. 703(g)(2) provides trial counsel may obtain "[e]vidence under the control of the Government" simply by "notifying the custodian of the evidence of the time, place, and date the evidence is required and requesting the custodian to send or deliver the evidence."

Assistant trial counsel's 16 June 2022 memorandum to the MTF records custodian specifically referred to HIPAA, asserted **[*16]** the request was relevant and

[3] We emphasize that in accordance with Article 6b(e), UCMJ, the issue before us is Petitioner's request for relief with regard to the military judge's ruling on the Defense's motion to compel. The propriety of the means by which the Government obtained Petitioner's records from the MTF is not *directly* before us, and our conclusion that Petitioner has not met the high standard to demonstrate her entitlement to mandamus relief with regard to the subject ruling is not a decision as to whether, in other forums and under ordinary standards of review, Petitioner would be entitled to relief with regard to how her records were obtained from the MTF.

material for a legitimate law enforcement purpose, was in writing and specifically requested records from a date range relevant to the charged offenses, and asserted de-identified information could not reasonably be used. The memorandum was evidently intended as an "administrative request" that satisfied the DoDM 6025.18 ¶ 4.4.f.(1)(b)3 law-enforcement exception. Moreover, because the records in question were possessed by an MTF on Fort Bragg, the records were "under the control of the Government," that is, an agency of the United States within the DoD. Therefore, under R.C.M. 703(g)(2)—that is, a regulation prescribed by the President—unlike evidence not under the control of the Government, it is not apparent that assistant trial counsel's request for the MTF records required a subpoena and related due process covered by R.C.M. 703(g)(3). Accordingly, we are not persuaded that Petitioner has clearly and indisputably demonstrated the Prosecution unlawfully obtained her medical records from the MTF in violation of her constitutional, statutory, or other privacy rights.

Assuming for purposes of argument that the Prosecution did improperly obtain Petitioner's records, we are not persuaded the military judge clearly **[*17]** and indisputably erred by analyzing the Defense's motion to compel as a matter of discovery under R.C.M. 701 rather than a matter of production under R.C.M. 703. The military judge was presented with a situation in which, whether by proper or improper means, the Prosecution was in possession of and had reviewed the records. At the motion hearing, Petitioner and the Government evidently conceded at least some of the records should be disclosed to the Defense. This situation implicates R.C.M. 701. We need not decide and do not suggest the military judge lacked the authority or discretion to address Petitioner's concerns regarding how the Government obtained her records from the MTF, had Petitioner raised such concerns; however, that was not the issue before the military judge. The issue for the military judge was the Defense's request for access to relevant and material documents in the possession of the Prosecution.

Furthermore, in light of the protective order limiting access to defense counsel and expert consultants, we find Petitioner has not demonstrated she is clearly and indisputably entitled to relief on the basis of her right to respect for her privacy under *Article 6b(a), UCMJ*, in light of the military judge's decision to **[*18]** provide the records to the Defense without in camera review. Certainly, the military judge had the discretion to resolve the Defense's motion to compel in other ways, and we need not and do not specifically indorse his ruling. However, considering the Defense's right to access under R.C.M. 701(a)(2) and R.C.M. 701(e), we are not persuaded the military judge's decision to forego in camera review of all of the medical records was clearly and indisputably erroneous.

C. Mil. R. Evid. 513 and Mil. R. Evid. 514

In addition to her right for respect for her privacy under Article 6b, UCMJ, as discussed above, Petitioner invokes the "protections of Mil. R. Evid. 513 and [Mil. R. Evid.] 514."

With respect to Mil. R. Evid. 514, the matters provided by Petitioner, the Government, and the Defense do not substantiate that the medical and FAP records at issue contain confidential communications between an alleged victim and victim advocate that would be subject to the rule, or that Petitioner or either party represented to the military judge that they did. Accordingly, we find Petitioner has failed to demonstrate her clear and indisputable right to relief on the basis of Mil. R. Evid. 514.

However, we find Petitioner has demonstrated her entitlement to some relief with respect to Mil. R. Evid. 513. Maj DC's declaration confirms that Petitioner's counsel did assert **[*19]** to the military judge that the FAP records in particular contained material privileged under Mil. R. Evid. 513. The petition and the Government's brief both indicate that Mil. R. Evid. 513 was raised. The Defense states "neither Petitioner nor the Government made firm assertions to the military judge that Petitioner's records included information subject to Mil. R. Evid. 513." However, the Defense does not deny Petitioner's counsel invoked Mil. R. Evid. 513 to some extent, and has not provided matter for our consideration that contradicts Maj DC's declaration. The military judge's ruling on the defense motion to compel is silent on the matter, and in fact does not refer to Mil. R. Evid. 513 at all. Although we have not requested or been provided a recording or transcript of the motion hearing itself, we find Maj DC's unimpeached declaration is a sufficient factual basis to conclude Petitioner's counsel asserted the FAP records contained Mil. R. Evid. 513 material.

HN10[↑] Mil. R. Evid. 513(a) generally provides a patient "a privilege to refuse to disclose *and to prevent any other person from disclosing*" subject communications between the patient and psychotherapist or assistant. (Emphasis added). Certain

enumerated exceptions exist, and the Courts of Criminal Appeals have suggested the continuing existence of **[*20]** a non-enumerated "constitutionally required" exception. *See* *United States v. Morales, No. ACM 39018, 2017 CCA LEXIS 612, at *12-28 (A.F. Ct. Crim. App. 13 Sep. 2017)* (unpub. op.). However, before a military judge orders "the production or admission of evidence of a patient's records or communication, the military judge *must* conduct a hearing, which shall be closed," where the patient "must be afforded a reasonable opportunity to attend . . . and be heard." Mil. R. Evid. 513(e)(2) (emphasis added). The matters before us establish the military judge ordered the disclosure of FAP records as to which Petitioner asserted the Mil. R. Evid. 513 privilege without holding the required closed hearing.

As noted above, the military judge's order did not address Mil. R. Evid. 513 at all. Therefore, we cannot be certain how the military judge analyzed the application of the rule. For purposes of our analysis, we considered that one might subject the term "production" to a narrow interpretation echoing the distinction in R.C.M. 701 and R.C.M. 703 between "discovery" and "production." Thus, one might argue that discovery from one party to another under R.C.M. 701 is distinct from "production" and does not trigger the application of Mil. R. Evid. 513(e)(2). However, we find such a cramped interpretation of "production" and the application of Mil. R. Evid. 513(e)(2) is not appropriate. ***HN11***[↑] The core privilege established by Mil. R. Evid. 513(a) broadly empowers **[*21]** a patient to prevent any disclosure from one person to another, and the military judge's ruling purported to compel such a disclosure. *See* *United States v. Beauge, 82 M.J. 157, 161 (C.A.A.F. 2022)* ("[Mil. R. Evid.] 513(e) provides the procedure that must be followed when a party seeks to *discover* information pursuant to any of the enumerated exceptions." (Emphasis added).).

Accordingly, we conclude Petitioner has clearly and indisputably demonstrated she is entitled to relief with respect to Mil. R. Evid. 513 and the FAP records. Moreover, we find there is no other adequate means to secure relief, as Congress has specifically authorized Petitioner to seek mandamus relief from this court for a military judge's ruling affecting protections afforded her by Mil. R. Evid. 513. Furthermore, we find the issuance of such a writ is appropriate under the circumstances.

Accordingly, it is by the court on this 7th day of December, 2022,

ORDERED:

Petitioner's petition for extraordinary relief in the nature of a writ of mandamus is **GRANTED IN PART** and **DENIED IN PART**. The military judge's 11 October 2022 ruling granting the defense motion to compel discovery is **SET ASIDE IN PART**, specifically with respect to the FAP records in the Government's possession. The defense motion to compel discovery remains pending before **[*22]** the military judge with regard to the FAP records in the Government's possession.

The stay of proceedings issued by this court on 24 October 2022 is hereby **REMOVED**. Court-martial proceedings may resume consistent with this order and with Mil. R. Evid. 513.

In re HK

United States Air Force Court of Criminal Appeals

September 13, 2021, Decided

Misc. Dkt. No. 2021-07

Reporter
2021 CCA LEXIS 535 *

In re HK, Petitioner

Case Summary

Overview
HOLDINGS: [1]-An alleged victim's petition for a writ of mandamus dated 13 September 2021 requesting the vacation of a trial judge's decision to grant a defense-requested continuance was denied since the victim did not have the right to be heard by the military judge at the trial level on the continuance issue because nowhere in Unif. Code Mil. Justice art. 6b, were victims granted the right to be heard by a trial judge on any matter other than an accused's sentence or confinement; Article 6 includes no provision requiring a victim be granted the opportunity to be heard at the trial level regarding his or her right to proceedings free from unreasonable delay.

Outcome
Petition denied.

LexisNexis® Headnotes

Military & Veterans Law > Military Justice > Judicial Review > Extraordinary Writs

Military & Veterans Law > Military Justice > Judicial Review > Finality

Military & Veterans Law > Military Justice > Jurisdiction > Subject Matter Jurisdiction

Military & Veterans Law > ... > Courts Martial > Pretrial Proceedings > Investigations

HN1[] **Judicial Review, Extraordinary Writs**

This court has jurisdiction over the petition under Unif. Code Mil. Justice art. 6b, which establishes a victim's ability to petition this court when the victim believes a court-martial ruling violates the rights of the victim afforded by that article. Unif. Code Mil. Justice art. 6b, 10 U.S.C.S. § 806b(e)(1). The purpose of a writ of mandamus is to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so. In order to prevail on a petition for a writ of mandamus, a petitioner must show that (1) there is no other adequate means to attain relief; (2) the right to issuance of the writ is clear and indisputable; and (3) the issuance of the writ is appropriate under the circumstances. A writ of mandamus is a drastic instrument which should be invoked only in truly extraordinary situations.

Military & Veterans Law > Military Justice > Judicial Review > Extraordinary Writs

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Judicial Discretion

HN2[] **Judicial Review, Extraordinary Writs**

A military judge's decision warranting reversal via a writ of mandamus must amount to more than even gross error; it must amount to a judicial usurpation of power or be characteristic of an erroneous practice which is likely to recur.

Military & Veterans Law > Military Justice > Apprehension & Restraint of Civilians & Military Personnel > Circumstances Warranting Confinement & Restraint

Military & Veterans Law > Military Justice > Apprehension & Restraint of Civilians & Military Personnel > Unlawful Restraint

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

Military & Veterans Law > ... > Courts Martial > Sentences > Confinement

HN3[] **Apprehension & Restraint of Civilians & Military Personnel, Circumstances Warranting Confinement & Restraint**

The right to be heard under Unif. Code Mil. Justice art. 6b only extends to hearings related to an accused's sentencing and pre- and post-trial confinement. The article further permits a victim to seek a petition for extraordinary relief from a Court of Criminal Appeals for violations of those eight rights in addition to violations of various other rules. Nowhere in Article 6b are victims granted the right to be heard by a trial judge on any matter other than an accused's sentence or confinement; instead, the enforcement of victims' rights is sought through petitions to appellate courts.

Military & Veterans Law > Military Justice > Judicial Review > Finality

Military & Veterans Law > Military Justice > Apprehension & Restraint of Civilians & Military Personnel > Unlawful Restraint

HN4[] **Judicial Review, Finality**

The Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771--unlike Unif. Code Mil. Justice art. 6b--explicitly calls for alleged violations of victims' rights to be raised before, and decided by, the district court in which the defendant is being prosecuted. 18 U.S.C.S. § 3771(d)(3). Upon an adverse ruling, a victim to whom the CVRA applies may then seek a writ of mandamus from the relevant court of appeals.

Military & Veterans Law > Military Justice > Apprehension & Restraint of Civilians & Military Personnel > Speedy Trial

HN5[] **Apprehension & Restraint of Civilians & Military Personnel, Speedy Trial**

Unif. Code Mil. Justice art. 6b includes no provision requiring a victim be granted the opportunity to be heard at the trial level regarding his or her right to proceedings free from unreasonable delay.

Judges: [*1] Before PANEL 1.

Opinion

ORDER

On 13 September 2021, Petitioner requested this court issue a writ of mandamus vacating a trial judge's decision to grant a defense-requested continuance. Petitioner further asks us to find that she has standing to argue for her rights under *Article 6b, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 806b*, before the trial judge. This court docketed the petition on 16 September 2021; we thereafter granted the Government and the accused leave to file answers to the petition, and granted Petitioner leave to file a reply to those answers. Having considered the petition, the answers, and the reply, we find Petitioner is not entitled to the requested relief.

I. BACKGROUND

On 9 June 2021, four charges against TSgt LB ("the accused") were referred to a general court-martial; one of these charges alleges the accused sexually assaulted Petitioner. During voir dire of the potential court members on 23 August 2021, the Defense learned the Government intended to rely on evidence which the Defense had not been provided in discovery. The Government then turned over nearly 2,000 pages of text messages to the Defense. The next day, on 24 August 2021, the Defense sought a continuance, via a written **[*2]** motion, to review the evidence. The Government opposed the Defense's request but did not submit a written response to the motion. Also on 24 August 2021, Petitioner, through her special victims' counsel, submitted a written response to the military judge, objecting to any continuance. She argued that *Article 6b, UCMJ*, guaranteed her the right to proceedings free from unreasonable delay, and that any delay in the case would only compound the financial burdens she was already suffering by virtue of being required to be present for the court-martial. She asserted that her hourly job did not pay her when she was not present for work, and the prospect of missing more work endangered her ability to pay her rent and support her family.

Also on 24 August 2021, the military judge granted the Defense's motion and set the court-martial for 11 April 2022, nearly eight months later.[1] In his written ruling, the military judge concluded Petitioner did not have standing to be heard on the matter, and that Petitioner's avenue of redress was to seek a writ of mandamus from a military Court of Criminal Appeals. The instant petition followed, in which Petitioner asks us to vacate the military judge's ruling and to direct **[*3]** the military judge to permit her to assert her rights under *Article 6b, UCMJ*, at the accused's court-martial.[2]

II. Law

HN1[↑] This court has jurisdiction over the petition under *Article 6b, UMCJ*, which establishes a victim's ability to petition this court when the victim "believes . . . a court-martial ruling violates the rights of the victim afforded" by that article. *Article 6b(e)(1), UCMJ, 10 U.S.C. § 806b(e)(1)*. The purpose of a writ of mandamus is to "confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." *Roche v. Evaporated Milk Association, 319 U.S. 21, 26, 63 S. Ct. 938, 87 L. Ed. 1185 (1943)* (citations omitted). In order to prevail on a petition for a writ of mandamus, a petitioner "must show that (1) there is no other adequate means to attain relief; (2) the right to issuance of the writ is clear and indisputable; and (3) the issuance of the writ is appropriate under the circumstances." *Hasan v. Gross, 71 M.J. 416, 418 (C.A.A.F. 2012)* (citing *Cheney v. United States Dist. Court for D.C., 542 U.S. 367, 380-81, 124 S. Ct. 2576, 159 L. Ed. 2d 459, (2004)*). A writ of mandamus "is a 'drastic instrument which should be invoked only in truly extraordinary situations.'" *Howell v. United States, 75 M.J. 386, 390 (C.A.A.F. 2016)* (quoting *United States v. Labella, 15 M.J. 228, 229 (C.M.A. 1983)* (per curiam)).

HN2[↑] A military judge's decision warranting reversal via a writ of mandamus "must amount to more than even gross error; it must amount to a judicial usurpation of power . . . or be characteristic of an erroneous practice which is **[*4]** likely to recur." *Labella, 15 M.J. at 229* (internal quotation marks and citations omitted).

III. Analysis

We begin our analysis with a brief review of victims' rights in the context of the military justice system, because an understanding of the evolution of those rights helps define what Petitioner is and is not entitled to under *Article 6b, UCMJ*.

In July 2013—prior to the enactment of *Article 6b, UCMJ*—the United States Court of Appeals for the Armed Forces (CAAF) ruled on a petition for extraordinary relief brought by LRM, the named victim in a then-ongoing sexual assault court-martial. *LRM v. Kastenberg, 72 M.J. 364 (C.A.A.F. 2013)*. The trial judge in that case had said he was prohibiting LRM from being heard through her detailed special victims' counsel on matters pertaining to Mil. R. Evid. 412 (victim's sexual behavior or predisposition) and Mil. R. Evid. 513 (psychotherapist-patient privilege). *Id. at 366-67*. LRM's subsequent petition for extraordinary relief sought an order directing the military judge to reverse his position and receive motions and accompanying papers from her. *Id. at 372*. The CAAF found the military judge's ruling to be erroneous—in part because both Mil. R. Evid. 412 and Mil. R. Evid. 513 explicitly granted LRM a reasonable opportunity to attend the relevant hearings and be heard at them. *Id. at 370-71*. The court further concluded neither rule **[*5]** precluded her from being heard *through counsel. Id*.

Later that year, Congress passed the *National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, 127 Stat. 672 (26 Dec. 2013) (FY14 NDAA)*. *Section 1701* of that act was titled, "Extension of Crime Victims' Rights to Victims of Offenses Under the Uniform Code of Military Justice," and created Article 6b, UCMJ. As originally enacted, that article defined eight substantive rights for victims of crimes under the UCMJ, including the right to be reasonably protected from an accused, the right to notice of certain events, and the right to be treated with fairness and respect for his or her dignity and privacy. *Article 6b(a), UCMJ*, *10 U.S.C. § 806b*. Two of those eight specific rights are relevant here: (1) the right to proceedings free from unreasonably delay, and (2) the right to be reasonably heard at certain proceedings. *Id.* The latter provision entitles a victim to be reasonably heard at: (1) pretrial confinement hearings; (2) sentencing hearings; and (3) clemency and parole hearings. *Id.* The FY14 NDAA did not include

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[1] Trial defense counsel told the military judge their first available date for trial was 24 January 2022. The Government, meanwhile, said it could not be prepared to proceed until 11 April 2022 due to witness availability.

[2] Petitioner does not challenge the military judge's decision on the continuance request itself, but rather the fact he ruled without hearing from her.

any enforcement mechanism related to alleged violations of these rights; however, it directed the Secretary of Defense to recommend changes to the Manual for Courts-Martial and prescribe relevant regulations to address such issues as enforcement and complaints of violations. **[*6]** FY14 NDAA § 1701(b). Thus, as a result of the FY14 NDAA, victims of offenses under the UCMJ were given the right to be heard at hearings related to an accused's sentencing, as well as pre- and post-trial confinement-related proceedings. In addition, and separate from *Article 6b, UCMJ*, victims had the right to be heard at courts-martial with respect to matters as specifically permitted by other authorities, such as Mil. R. Evid. 412 and Mil. R. Evid. 513.

Since its enactment, *Article 6b, UCMJ*, has been repeatedly amended, but its overall structure has remained the same. In the National Defense Authorization Act for Fiscal Year 2015, Congress added an enforcement mechanism to this article, granting victims the ability to petition a Court of Criminal Appeals for a writ of mandamus in the event of an alleged violation of any of the eight rights set out in the act, as well as for alleged violations of Mil. R. Evid. 412 and Mil. R. Evid. 513. *Pub. L. No. 113-291 § 535, 128 Stat. 3292 (2014)*.[3] The following year, the writ of mandamus provision was expanded to reach alleged violations of Mil. R. Evid. 514 (victim advocate-victim privilege) and Mil. R. Evid. 614 (exclusion of witnesses from a courtroom). *See* National Defense Authorization Act for Fiscal Year 2016, Pub. L. No. 114-92 § 531, 129 Stat. 726 (2015). In the National Defense Authorization Act for Fiscal Year 2018 amendments, the CAAF was given authority to review rulings by the Courts of Criminal Appeals on petitions seeking to enforce **[*7]** those protections afforded under *Article 6b, UCMJ*. Pub. L. No. 115-91 § 531, 131 Stat. 1283 (2017). Most recently, in 2021, victims were given the right to notice of certain post-trial motions, filings, and hearings. *See* National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283 § 541, 134 Stat. 3388 (2021).

In spite of the frequent amendments of *Article 6b, UCMJ*, what has not changed is its overall structure with respect to victim rights. The article sets out the eight rights, one of which is the right to be heard. ***HN3***[] But this right to be heard only extends to hearings related to an accused's sentencing and pre- and post-trial confinement. The article further permits a victim to seek a petition for extraordinary relief from a Court of Criminal Appeals for violations of those eight rights in addition to violations of various other rules. Nowhere in *Article 6b, UCMJ*, are victims granted the right to be heard by a trial judge on any matter other than an accused's sentence or confinement; instead, the enforcement of victims' rights is sought through petitions to appellate courts.

Petitioner and the parties offer various theories on whether HK has standing to be heard on her right to proceedings free from unreasonable delay under *Article 6b(a)(7), UCMJ. 10 U.S.C. § 806b(a)(7)*. By the plain language of *Article 6b, UCMJ*, she does. The salient question here is whether she has the right to be heard by the military judge at the trial **[*8]** level on this issue, and we conclude she does not.[4]

Petitioner points us to the *Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771*, which was passed in 2004 and addresses victim rights in federal courts. Her theory is that *Article 6b, UCMJ*, was generally derived from the CVRA, and the CVRA's legislative history shows that the bill's sponsors were concerned about the impact of trial delays on victims. In support of this theory, she points to federal district courts which have considered victims' inputs regarding proposed delays. Petitioner's theory is not without basis, in light of both the textual similarities between the CVRA and *Article 6b, UCMJ*,

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[3] This amendment also authorized petitions with respect to preliminary hearings under ***Article 32, UCMJ, 10 U.S.C. § 832***, as well as to any order directing a victim's deposition.

[4] The accused in this case argues that Petitioner's claim is moot by virtue of the original trial date having passed. As a result of the military judge's ruling on the motion for a continuance, however, the court-martial is not scheduled to recommence until April 2022. Thus, if we were to vacate the military judge's ruling and direct a new hearing in which Petitioner is permitted to be heard, a new trial date might be established which takes Petitioner's interests into consideration and results in an agreeable schedule. As a result, we conclude we can redress the injury alleged here, and Petitioner's claim is not moot. *Cf.,* *Uzuegbunam v. Preczewski, U.S. , 141 S. Ct. 792, 802, 209 L. Ed. 2d 94 (2021)* (concluding that even nominal damages of one dollar may provide redress and defeat a claim of mootness). Similarly, insofar as the accused's court-martial is still pending, we find it entirely foreseeable one or both of the parties might seek future continuances, and that the military judge would again refuse to hear from Petitioner and issue further near-immediate rulings. This determination renders the issue presented here "capable of repetition, yet evading review," an exception to the general doctrine of mootness. *See, e.g.,* *Roe v. Wade, 410 U.S. 113, 125, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973)* (quoting *Southern Pacific Terminal Co. v. ICC, 219 U.S. 498, 515, 31 S. Ct. 279, 55 L. Ed. 310 (1911)*).

and the fact the act creating *Article 6b, UCMJ*, titled that provision as "Extension of Crime Victims' Rights to Victims of Offenses Under the Uniform Code of Military Justice." However, even if we were to assume *Article 6b, UCMJ*, is based on the CVRA, this would not help Petitioner's argument here. ***HN4***[⬆] The CVRA—unlike *Article 6b, UCMJ*—explicitly calls for alleged violations of victims' rights to be raised before, and decided by, the district court in which the defendant is being prosecuted. *18 U.S.C. § 3771(d)(3)*. Upon an adverse ruling, a victim to whom the CVRA applies may *then* seek a writ of mandamus from the relevant court of appeals. *Id.*

If Congress did in fact use the CVRA **[*9]** as a template in crafting *Article 6b, UCMJ*, the absence in the latter of a requirement for the trial court to first hear matters of alleged victim-right violations tells us Congress likely considered—and rejected—applying the CVRA's trial-level enforcement mechanism to the military. Our role, however, is not to try and divine either why Congress declined to legislatively entitle victims in the military justice system to be heard by trial judges on alleged violations of any of the eight rights in *Article 6b, UCMJ*, or why the article only specifically entitles victims to be heard at confinement- and sentence-related hearings. Instead, our role is to apply *Article 6b, UCMJ*, as Congress enacted it, and that ***HN5***[⬆] article includes no provision requiring a victim be granted the opportunity to be heard at the trial level regarding his or her right to proceedings free from unreasonable delay.

For the foregoing reasons, Petitioner has not demonstrated that the right to issuance of the writ she seeks is clear and indisputable, and she has therefore failed to show the appropriateness of the relief she requests.

Accordingly, it is by the court on this 22d day of October, 2021,

ORDERED:

The Petition for Writ of Mandamus dated 13 September 2021 is **DENIED [*10]** .

End of Document

In re HVZ

United States Air Force Court of Criminal Appeals

July 14, 2023, Decided

Misc. Dkt. No. 2023-03

Reporter
2023 CCA LEXIS 292 *

In re HVZ, Petitioner, Michael K. FEWELL, Technical Sergeant (E-6), U.S. Air Force, Real Party in Interest

Notice: NOT FOR PUBLICATION

Prior History: **[*1]** Review of Petition for Extraordinary Relief in the Nature of a Writ of Mandamus. Military Judge: Matthew P. Stoffel. GCM convened at: Luke Air Force Base, Arizona.

Counsel: For Petitioner: Major Marilyn S.P. McCall, USAF; Devon A.R. Wells, Esquire.

For Technical Sergeant Fewell: Major David L. Bosner, USAF; Captain Samantha M. Castanien, USAF; Captain Rebecca J. Saathoff, USAF.

For the United States: Colonel Naomi P. Dennis, USAF; Major Morgan R. Christie, USAF; Mary Ellen Payne, Esquire.

Judges: Before JOHNSON, RICHARDSON, and CADOTTE, Appellate Military Judges. Chief Judge JOHNSON delivered the opinion of the court, in which Senior Judge RICHARDSON and Judge CADOTTE joined.

Opinion by: JOHNSON

Opinion

JOHNSON, Chief Judge:

On 16 May 2023, pursuant to *Article 6b, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 806b*,[1] and *Rule 19 of the Joint Rules of Appellate Procedure for Courts of Criminal Appeals, JT. CT. CRIM. APP. R. 19*, Petitioner requested this court issue a writ of mandamus and stay of proceedings in the pending court-martial of *United States v. Technical Sergeant Michael K. Fewell* (the Accused). Petitioner requests this court "vacate the trial court's decision [dated 11 May 2023] to order disclosure of extensive medical records" of Petitioner. On 19 May 2023, this court issued an order staying the court-martial proceedings and staying further implementation of the trial court's 11 May **[*2]** 2023 order to the 56th Medical Group (56 MDG), pending further order by this court. This court also ordered counsel for the Government and counsel for the Accused to submit briefs in response to the petition no later than 8 June 2023. This court received the parties' timely responsive briefs opposing the petition on 8 June 2023. Petitioner submitted a reply brief on 15 June 2023.

Having considered the petition, the responsive briefs, Petitioner's reply brief, and the matters attached thereto, we deny the petition.

I. Background

The petition, responsive briefs, and reply brief, with their several attachments, establish the following sequence of events.

On 10 January 2023, the convening authority referred for trial two specifications of sexual assault in violation of *Article 120, UCMJ, 10 U.S.C. § 920*; two specifications of domestic violence in violation of *Article 128b, UCMJ, 10 U.S.C. § 928b*; and two specifications of wrongful use of controlled substances in violation of *Article 112a, UCMJ, 10 U.S.C. § 912a*. Petitioner is the alleged victim of the charged *Article 120, UCMJ*, and *Article 128b, UCMJ*, offenses.

On 28 April 2023, the Defense moved the trial court to "immediately secure and produce" Petitioner's "medical records and non-privileged materials within mental health records, specifically **[*3]** unprotected health information as described under *United States v. Mellette[, 82 M.J. 374 (C.A.A.F. 2022)]*," in the

[1] References in this opinion to the UCMJ, Rules for Courts-Martial, and Military Rules of Evidence are to the *Manual for Courts-Martial, United States* (2019 ed.).

possession of the Government.

On 2 May 2023, through her Victims' Counsel, Petitioner submitted to the trial court an opposition to the defense motion, with the exception of medical records relating specifically to injuries to Petitioner's neck and back. Petitioner argued, "[o]utside of this item, Defense has not only failed to show that a treatment or diagnosis exists, but that if they did, such records do not consist solely of privileged information [under Mil. R. Evid. 513]. Nor has Defense shown they would be entitled to such records under R.C.M. 703(e) . . . ." In the alternative, if the military judge granted the defense motion, Petitioner requested the military judge perform in camera review of her records and release only those he determined to be relevant and necessary to the preparation of the defense.

On 4 May 2023, the Government responded and opposed the defense motion in part. The Government did not oppose the motion with respect to nonprivileged Family Advocacy records and medical records dated on and after 19 January 2020—the date of the earliest alleged offense of which Petitioner is the alleged victim—but opposed the disclosure of records **[*4]** from prior to 19 January 2020.

On 11 May 2023, the military judge issued an order granting the defense motion in part. The military judge's findings of fact included, *inter alia*, that Petitioner was the "primary witness against the [A]ccused" on each of the charged offenses; that Petitioner and the Accused were married at the time of the alleged offenses; and that Petitioner had told multiple individuals she had sought medical and mental health treatment due to injuries allegedly caused by the Accused, and had spoken with Family Advocacy personnel. The military judge noted the responses to the defense motion from the Government and from Petitioner, but stated he had not considered the latter due to Petitioner's "lack of standing before this trial court," citing *In re HK, Misc. Dkt. No. 2021-07, 2021 CCA LEXIS 535 (A.F. Ct. Crim. App. 2021)* (order). The military judge further explained:

> The court concludes the [D]efense is entitled to discovery of [Petitioner's] medical records and non-privileged mental health records relevant to the charged offenses that are maintained by the medical treatment facility located at Luke Air Force Base [AFB]. The court concludes the [D]efense has made a valid request for discovery of the information in accordance with R.C.M. 701(a)(2)(B). The court **[*5]** further concludes that any such records are within the possession, custody, or control of military authorities. *See generally In re A[L], [Misc. Dkt. No. 2022-12,] 2022 CCA LEXIS 702 (A.F. [Ct. Crim. App. 7 Dec.] 2022)* [(order)]. . . . The court also concludes that the content of the records from the date of the first charged offenses, that is 19 January 2020 through present day is relevant to defense preparation; in fact, the parties are in agreement on this matter. . . .

The military judge similarly found the Defense was entitled to discovery of records maintained at the Family Advocacy office on Luke AFB. The military judge found the defense motion was "not ripe" with respect to records not maintained at Luke AFB because the Defense "has not provided sufficient particularity to the [P]rosecution of where to search for such records . . . ."

Accordingly, pursuant to R.C.M. 701(g)(1), the military judge ordered trial counsel to "identify what medical records, nonprivileged mental health records, and nonprivileged Family Advocacy records of [Petitioner] are within the possession, custody, or control of military authorities, located at Luke [AFB], including those generated before, during, and after the charged timeframes." The military judge further ordered trial counsel to provide to the Defense **[*6]** such records as were subject to disclosure and "relevant to the [D]efense's preparation." Trial counsel were further ordered to inform the Defense and military judge of records that were privileged or not subject to disclosure and the basis for nondisclosure.

In furtherance of his ruling, on 11 May 2023 the military judge also issued a separate order to the 56 MDG located at Luke AFB to "provide any medical, mental health, or Family Advocacy records [pertaining to Petitioner] maintained by the [56 MDG] or any subordinate clinic." The military judge directed the 56 MDG to work with a medical law attorney to "ensure any and all matters subject to privilege under Military Rule of Evidence 513 are redacted prior to providing the information" to trial counsel "as soon as practicable and no later than 1700 local on 24 May 2023." The military judge further ordered that only the Prosecution and Defense (to include appointed expert consultants), as well as Petitioner and her Victims' Counsel, were to have access to the disclosed records.

As noted above, on 19 May 2023 this court stayed the proceedings of the court-martial and further implementation of the military judge's 11 May 2023 order.

II. Discussion

A. Law

The *All Writs Act, 28 U.S.C. § 1651(a)*, grants **[*7]** a Court of Criminal Appeals (CCA) "authority to issue extraordinary writs necessary or appropriate in aid of its jurisdiction." *Chapman v. United States, 75 M.J. 598, 600 (A.F. Ct. Crim. App. 2016)* (citing *Loving v. United States, 62 M.J. 235, 246 (C.A.A.F. 2005)*). The purpose of a writ of mandamus is to "confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." *Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 26, 63 S. Ct. 938, 87 L. Ed. 1185 (1943)* (citations omitted). In order to prevail on a petition for a writ of mandamus, the petitioner "must show that: (1) there is no other adequate means to attain relief; (2) the right to issuance of the writ is clear and indisputable; and (3) the issuance of the writ is appropriate under the circumstances." *Hasan v. Gross, 71 M.J. 416, 418 (C.A.A.F. 2012)* (citing *Cheney v. United States Dist. Court, 542 U.S. 367, 380-81, 124 S. Ct. 2576, 159 L. Ed. 2d 459 (2004)*); *see also In re KK*, *__ M.J. __, Misc. Dkt. No. 2022-13, 2023 CCA LEXIS 31, at *10 (A.F. Ct. Crim. App. 24 Jan. 2023)* (holding traditional mandamus standard of review applicable to *Article 6b(e), UCMJ*, petitions). A writ of mandamus "is a 'drastic instrument which should be invoked only in truly extraordinary situations.'" *Howell v. United States, 75 M.J. 386, 390 (C.A.A.F. 2016)* (quoting *United States v. Labella, 15 M.J. 228, 229 (C.M.A. 1983)*).

Article 6b(e)(1), UCMJ, 10 U.S.C. § 806b(e)(1), states:

> If the victim of an offense under this chapter believes that . . . a court-martial ruling violates the rights of the victim afforded by a section (article) or rule specified in *paragraph (4)*, the victim may petition the [CCA] for a writ of mandamus to require the . . . court-martial to comply with the section (article) or rule.

Article 6b(e)(4), UCMJ, provides **[*8]** that this right to petition the CCA for a writ of mandamus applies with respect to protections afforded by, *inter alia*, *Article 6b, UCMJ*, and Mil. R. Evid. 513.

Article 6b(a)(8), UCMJ, provides that the victim of an offense under the UCMJ has, among other rights, "[t]he right to be treated with fairness and with respect for the dignity and privacy of the victim . . . ."

In general, disclosure to the defense of documents in the possession of the prosecution is governed by Rule for Courts-Martial (R.C.M.) 701, whereas production to the defense of documents not in the possession, custody, or control of military authorities is governed by R.C.M. 703. *See United States v. Bishop, 76 M.J. 627, 634 (A.F. Ct. Crim. App. 2017)*; *see also United States v. Stellato, 74 M.J. 473, 481 (C.A.A.F. 2015)* (citing R.C.M. 701(a)(2)(A)). "Each party shall have adequate opportunity to prepare its case and equal opportunity to interview witnesses and inspect evidence . . . ." R.C.M. 701(e); *see also 10 U.S.C. § 846(a)* ("In a case referred for trial by court-martial, the trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe.") "After service of charges, upon request of the defense, the Government shall permit the defense to inspect any . . . papers, documents, [or] data . . . if the item is within the possession, custody, or control of military **[*9]** authorities and [ ] the item is relevant to defense preparation." R.C.M. 701(a)(2)(A)(i).

Mil. R. Evid. 513(a) provides that, in general:

> A patient has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made between the patient and a psychotherapist or an assistant to the psychotherapist, in a case arising under the [UCMJ], if such communication was made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition.

"Before ordering the production or admission of evidence of a patient's records or communication,[2]] the military judge must conduct a hearing, which shall be closed. . . . The patient must be afforded a reasonable opportunity to attend the hearing and be heard." Mil. R. Evid. 513(e)(2). "The military judge may examine the evidence or a proffer thereof in camera, if such examination is necessary to rule on the production or admissibility of protected records or communications." Mil. R. Evid. 513(e)(3). In *Mellette*, the United States

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[2] For purposes of the rule, Mil. R. Evid. 513(b)(5) defines "[e]vidence of a patient's records or communications" as "testimony of a psychotherapist, or assistant to the same, or patient records that pertain to communications by a patient to a psychotherapist, or assistant to the same, for the purposes of diagnosis or treatment of the patent's mental or emotional condition."

Court of Appeals for the Armed Forces (CAAF) held "[t]he phrase 'communication made between the patient and a psychotherapist' [in Mil. R. Evid. 513(a)] does not naturally include other evidence, such as routine medical records, that do not memorialize actual communications **[*10]** between the patient and the psychotherapist," and "that diagnoses and treatments contained within medical records [including mental health records] are not themselves uniformly privileged under [Mil. R. Evid.] 513." *82 M.J. at 375, 378*.

B. Analysis

The military judge's ruling and order essentially did three things: (1) required the 56 MDG, with the assistance of a medical law attorney, to identify Petitioner's medical records, mental health records, and Family Advocacy records within the possession or control of the 56 MDG or subordinate clinics, and provide the non-privileged records to trial counsel; (2) required trial counsel to notify the military judge and Defense of the existence of records that were privileged or otherwise not subject to disclosure under R.C.M. 701 (*i.e.*, relevant to the preparation of the Defense); and (3) required trial counsel to provide the discoverable records to the Defense.

Petitioner requests this court "deny [g]overnment and [d]efense counsel [Petitioner's] medical records" and order the rescission of the military judge's 11 May 2023 order to the 56 MDG. In the alternative, Petitioner requests this court order the military judge review the records in camera and "apply the proper standards before producing **[*11]** the records to counsel." The petition raises two primary issues for our consideration: (1) whether the military judge erred by refusing to consider Petitioner's response to the Defense's discovery motion for lack of standing; and (2) whether the military judge incorrectly analyzed the Defense's motion as a matter of discovery governed by R.C.M. 701(a)(2)(A) rather than a matter of production governed by R.C.M. 703(g)(3)(C)(ii). We consider each contention in turn.

1. Refusal to Consider Petitioner's Motion Response

As noted above, the military judge refused to consider Petitioner's response to the Defense's discovery motion because he found Petitioner lacked "standing" before the court-martial, citing *In re HK*. In that decision, this court explained that although the alleged victim had standing to petition this court regarding her right to proceedings free from unreasonable delay, *Article 6b, UCMJ*, "include[d] no provision requiring a victim be granted the opportunity to be heard *at the trial level* regarding his or her right to proceedings free from unreasonable delay." *In re HK, order at *7, *9* (emphasis added). The military judge's comments imply he concluded, similar to this court's determination in *In re HK*, that victim rights enumerated in *Article 6b(a), UCMJ*, including *inter alia* ***[*12]*** the "right to be treated with fairness and with respect for the dignity and privacy of the victim," do not create an independent right for a victim to be heard by the military judge at the trial level with regard to such rights. *Article 6b(e), UCMJ*, provides a victim the right to petition this court for a writ of mandamus if he or she believes a ruling by the trial court violates rights protected by *Article 6b, UCMJ*, itself or by other provisions of law specified in *Article 6b(e)(4), UCMJ*. However, *Article 6b, UCMJ*, does not *create* the right to be heard *by the trial court* on any and all matters affecting those rights, other than during presentencing proceedings in accordance with *Article 6b(a)(4)(B), UCMJ*.

On the other hand, *Article 6b, UCMJ*, does not remove a victim's right to be heard where that right exists in other provisions of law independent of *Article 6b, UCMJ*. The military judge concluded that the Defense's motion implicated discovery of Petitioner's records under R.C.M. 701 rather than production of her records under R.C.M. 703. As we discuss below, Petitioner fails to demonstrate the military judge was clearly and indisputably incorrect. R.C.M. 701, like *Article 6b, UCMJ*, itself, does not provide Petitioner the right to be heard at the trial court.

2. Discovery Under R.C.M. 701 versus Production Under R.C.M. 703

Petitioner contends the military judge erred by ordering **[*13]** discovery of her non-privileged medical and mental health records pursuant to R.C.M. 701(a)(2)(B), rather than analyzing the Defense's motion under R.C.M. 703. By doing so, Petitioner contends, the military judge erroneously applied the less-demanding "relevance" disclosure standard of R.C.M. 701(a)(2)(A)(i) rather than the more stringent "relevant and necessary" production standard of R.C.M. 703(e)(1). Petitioner contends the military judge's asserted error also denied her the right to notice and an opportunity to challenge the disclosure afforded to victims by R.C.M. 703(g)(3)(C)(ii) with respect to

records "not under the control of the Government." We again find Petitioner has failed to demonstrate the military judge clearly and indisputably erred.

R.C.M. 701(a)(2)(A)(i) provides the Defense access to, *inter alia*, "papers, documents, [and] data," or copies thereof, "if the item is within the possession, custody, or control of military authorities and [ ] the item is relevant to defense preparation . . . ." We find the military judge did not clearly and indisputably err by concluding that Petitioner's records "maintained" by the 56 MDG—a unit within the United States Air Force—were within the "possession, custody, or control" of a "military authority."

Whether any of the records are in fact **[*14]** relevant and to be disclosed to the Defense is effectively yet to be determined. At this stage, the military judge has required trial counsel to review the non-privileged records provided by the 56 MDG and to provide to the Defense only those trial counsel determine to be subject to disclosure under R.C.M. 701. Those records the 56 MDG identified as privileged, and those records trial counsel determined to be not subject to discovery, are to be identified to the Defense and military judge without disclosure at this point—potentially to be the subject of further proceedings.

Petitioner offers several arguments in support of her contention the military judge erred. We address the most significant of these in turn.

Petitioner contends she has a constitutional privacy interest in her medical records managed by the 56 MDG. We agree. *See, e.g.*, Doe v. Southeastern Pa. Transp. Auth., 72 F.3d 1133, 1137 (3d Cir. 1995) (interpreting Whalen v. Roe, 429 U.S. 589, 599-600, 97 S. Ct. 869, 51 L. Ed. 2d 64 (1977)); A.L.A. v. West Valley City, 26 F.3d 989, 990 (10th Cir. 1994) (citations omitted). However, Petitioner also recognizes there is a "balance [between] the Accused's constitutional right to put on a defense, and the rights of a victim to maintain the privacy of his or her medical records." We disagree with Petitioner's interpretation of how the applicable law strikes the balance between these competing interests. **[*15]**

Petitioner cites Stellato for the proposition that "evidence not in the physical possession of the prosecution team is still within its possession, custody, or control . . . when: (1) the prosecution has both knowledge of and access to the object; [and] (2) the prosecution has the legal right to obtain the evidence . . . ." 74 M.J. at 484-85. Petitioner then contends that the *Health Insurance Portability and Accountability Act (HIPAA), Public Law 104-191*, and its implementing regulations, notably Department of Defense Manual (DoDM) 6025.18, *Implementation of the Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule in DoD Health Care Programs* (13 Mar. 2019), prohibit trial counsel from accessing Petitioner's medical records "without a court order," citing DoDM 6025.18 ¶ 4.4.e. Therefore, Petitioner implies, her medical records were not in the possession of military authorities for purposes of R.C.M. 701(a)(2)(A). In light of the standard of review applicable to the petition, Petitioner's argument is not persuasive.

To begin with, the definition of "possession, custody, or control" by the prosecution set forth in Stellato is not necessarily the exclusive definition of "possession, custody, or control of military authorities." Stellato did not address control over medical records maintained by a military unit; rather, Stellato addressed whether the military judge in that case abused his discretion by finding the Army prosecutors exercised "control" over **[*16]** a piece of evidence held by a local sheriff's department. Stellato, 74 M.J. at 485. As we indicated above, medical records maintained by the 56 MDG would seem to fall within the plain meaning of "papers, documents, [and] data . . . within the possession, custody, and control of military authorities . . . ," and the military judge did not clearly and obviously err in reaching that conclusion.

Moreover, if we do apply Stellato and HIPAA in this situation, we do not reach Petitioner's conclusion that trial counsel access to patient records maintained by the 56 MDG necessarily requires a court order. As this court explained in *In re AL*, HIPAA, read in conjunction with its implementing regulations, with Article 46(a), UCMJ, and with R.C.M. 703(g)(2), facially permits trial counsel to obtain evidence under the control of the "Government"—in that case, records maintained by an Army military treatment facility—using an "administrative request" that meets certain criteria,[3] rather than a court

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[3] DoDM 6025.18 ¶ 4.4.f.(1)(b)3 provides:

> A DoD covered entity may disclose [protected health information] . . . [i]n compliance **[*17]** with, and as limited by, the relevant requirements of . . . [a]n administrative request, including an administrative subpoena or summons, a civil or an authorized investigative demand, or similar process authorized under law, if: [ ] [t]he information sought is relevant and material to a legitimate law enforcement inquiry[;] [ ] [t]he request is in writing, specific, and limited in scope to the extent reasonably

order. *In re AL, unpub. order at 2022 CCA LEXIS 702* (citations omitted). Thus, at least arguably, in the instant case trial counsel would have had knowledge, access, and a legal right to obtain Petitioner's medical records. *See Stellato, 74 M.J. at 484-85*.[4]

In her reply brief, Petitioner argues:

> Categorizing [Military Health System] records as in the possession, custody, and [sic] control of military authorities means ***any MHS patient records are accessible by prosecution without process***—to include any accused. Yet, if process is required, as is the case to comply with HIPAA, then [Military Health System] records are not in possession, custody, or control of military authorities or the Government.

We recognize the implied breadth of the military judge's reasoning. However, it is possible for non-privileged but sensitive personal records to be in the possession of military authorities—and **[*18]** the Prosecution in particular—and yet for the subject of those records to retain a protected privacy interest in them. Government attorneys routinely handle sensitive information that is subject to legal protection from unauthorized disclosure. Moreover, it is not accurate to say that finding medical records maintained by an Air Force medical group are within the possession, custody, or control of military authorities means they are accessible "without process." As indicated above, HIPAA and its implementing regulations do set out a process. Read in conjunction with *Article 46(a), UCMJ*, and R.C.M. 703(g)(2), it is at least fairly arguable HIPAA and its implementing regulations provide a process for trial counsel to obtain protected health information pursuant to a "legitimate law enforcement inquiry," provided the request meets certain criteria. DoDM 6025.18 ¶ 4.4.f.(1)(b)3. As in *In re AL*, we need not and do not determine whether this interpretation is definitively correct under ordinary standards of review applicable outside of an *Article 6b(e), UCMJ*, writ petition; we do find Petitioner has not met her burden to demonstrate she is clearly and indisputably entitled to relief.

> practicable in light of the purpose for which the information is sought[; and] [ ] [d]e-identified information could not reasonably be used.

[4] As in *In re AL*, our conclusion that Petitioner has not met her burden to demonstrate her clear and indisputable right to mandamus relief "is not a decision as to whether, in other forums and under ordinary standards of review, Petitioner would be entitled to relief." *In re AL, unpub. order at 2022 CCA LEXIS 702 n.3*.

3. Additional Considerations

We pause to address certain additional points made by the **[*19]** military judge and Government, and to clarify the limits of our ruling on the petition.

The military judge's ruling stated Petitioner's medical and non-privileged mental health records maintained by the 56 MDG "are within the possession, custody, or control of military authorities" for purposes of R.C.M. 701(a)(2)(B). For this proposition, the military judge cited generally *In re AL*, where this court stated that records possessed by a medical treatment facility on an Army base "were 'under the control of the Government,' that is, an agency of the United States." *In re AL, unpub. order at 2022 CCA LEXIS 702*. To be clear, and as the military judge perhaps recognized, the cited language from *In re AL* provides only indirect support for his conclusion. The cited language was not interpreting the meaning of "possession, custody, or control of military authorities" in R.C.M. 701(a)(2)(B), but whether a trial counsel could use an administrative request to obtain medical records "under the control of the Government" in accordance with R.C.M. 703(g)(2). The context is important lest *In re AL* be interpreted to stand for a proposition it does not. Moreover, it must be noted that *In re AL*, like the instant matter, was an *Article 6b(e), UCMJ*, mandamus petition, and its explanation of the law must be read cautiously **[*20]** in light of the standard of review and a petitioner's heavy burden to demonstrate a clear and indisputable right to relief.

In its answer brief, the Government notes that in the instant case, like *In re AL*, both the Government and Petitioner conceded at trial that the Defense should receive some portion of the contested records. The Government quotes *In re AL, unpub. order at 2022 CCA LEXIS 702*, for the proposition that "[t]his situation implicates R.C.M. 701." However, there was a distinction in *In re AL* that rendered the application of R.C.M. 701 more evident there than in the instant case. In *In re AL*, trial counsel had already obtained the records at issue. Thus "[t]he military judge was presented with a situation in which, whether by proper or improper means, the Prosecution was in possession of and had reviewed the records." *In re AL, unpub. order at 2022 CCA LEXIS 702*. The fact that the prosecutors already had the records in their possession is what implicated R.C.M. 701, more so than the concessions by the trial counsel and victim that a portion of the

records at issue should be disclosed.

Finally, we note Petitioner's "Statement of the Issue" does not assert any infringement of her substantive or procedural protections under Mil. R. Evid. 513. Accordingly, we have not reviewed whether the procedure specified **[*21]** by the military judge's order—whereby the 56 MDG assisted by "a medical law attorney" determines what matters are privileged and to be withheld before Petitioner's records are delivered to trial counsel—appropriately safeguards Petitioner's privilege to prevent disclosure of confidential communications protected by Mil. R. Evid. 513, and our ruling is without prejudice to Petitioner's future ability to seek review pursuant to *Article 6b(e)(4)(D), UCMJ*.

III. Conclusion

Petitioner's petition for extraordinary relief in the nature of a writ of mandamus is **DENIED**.

It is further ordered:

The stay of proceedings in the court-martial of *United States v. Technical Sergeant Michael K. Fewell* and stay on implementation of the trial court's order dated 11 May 2023 to the 56th Medical Group, previously issued by this court on 19 May 2023, are hereby **LIFTED**.

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In re KK

United States Air Force Court of Criminal Appeals

January 24, 2023, Decided

Misc. Dkt. No. 2022-13

Reporter
2023 CCA LEXIS 31 *

In re KK, Petitioner, Jason R. HALGREN, Master Sergeant (E-7), U.S. Air Force, Real Party in Interest

Prior History: [*1] Petition for Extraordinary Relief in the Nature of a Writ of Mandamus. Military Judge: Lance R. Smith.

Case Summary

Overview

HOLDINGS: [1]-The court denied the petition for writ of mandamus because victims involved in court-martial proceedings did not have the authority to challenge every ruling by a military judge with which they disagree; however, they could assert their rights enumerated in *Unif. Code Mil. Justice art. 6b, 10 U.S.C.S. § 806b*, and under applicable laws. Petitioner did not identify any right to have the accused's court-martial dates set such that they accommodate either her or her victims' counsel's schedule; [2]-While a victim's legal representation fell within the ambit of a victim's right to fairness, petitioner failed to convincingly explain how that fact lead to the conclusion that the military judge's ruling was wrong or violated her rights.

Outcome
Petition denied.

LexisNexis® Headnotes

Military & Veterans Law > Military Offenses > Assault

Military & Veterans Law > Military Justice > Apprehension & Restraint of Civilians & Military Personnel > Circumstances Warranting Confinement & Restraint

Military & Veterans Law > ... > Evidence > Privileged Communications > Self-Incrimination Privilege

HN1[] **Military Offenses, Assault**

Unif. Code Mil. Justice art. 6b(e)(1), 10 U.S.C.S. § 806b(e)(1), specifically permits a petition when a victim believes a violation has occurred.

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Appeal by United States

Military & Veterans Law > ... > Courts Martial > Pretrial Proceedings > Investigations

Military & Veterans Law > Military Justice > Jurisdiction > Subject Matter Jurisdiction

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

HN2[] **Trial Procedures, Appeal by United States**

The Court of Criminal Appeals has jurisdiction over a petition under *Unif. Code Mil. Justice art. 6b(e)(1), 10 U.S.C.S. § 806b(e)(1)*, which establishes a victim's ability to petition the court for a writ of mandamus when the victim believes a court-martial ruling violates the rights of the victim afforded by that article.

Military & Veterans Law > Military Justice > Judicial Review > Extraordinary Writs

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Judicial Discretion

Military & Veterans Law > Military Justice > Jurisdiction > In Personam Jurisdiction

HN3 **Judicial Review, Extraordinary Writs**

A writ of mandamus is a drastic and extraordinary remedy reserved for really extraordinary cases. Extraordinary writs serve to confine an inferior court to a lawful exercise of its prescribed jurisdiction. A military judge's decision warranting reversal via a writ of mandamus must amount to more than even gross error; it must amount to a judicial usurpation of power or be characteristic of an erroneous practice which is likely to recur.

HN4 In order to prevail on a petition for a writ of mandamus, a petitioner must show that: (1) there is no other adequate means to attain relief; (2) the right to issuance of the writ is clear and indisputable; and (3) the issuance of the writ is appropriate under the circumstances.

Military & Veterans Law > Military Offenses > Attempts

Military & Veterans Law > Military Justice > Apprehension & Restraint of Civilians & Military Personnel > Speedy Trial

Military & Veterans Law > Military Justice > Disclosure & Discovery > Depositions & Interrogatories

HN5 **Military Offenses, Attempts**

Unif. Code Mil. Justice art. 6b, 10 U.S.C.S. § 806b sets out rights held by victims of offenses under the Uniform Code of Military Justice. There of those specific rights are: (1) the right not to be excluded from court-martial proceedings; (2) the right to proceedings free from unreasonable delay; and (3) the right to be treated with fairness and with respect for the dignity and privacy of the victim. Unif. Code Mil. Justice art. 6b(a)(3), (a)(7), and (a)(9), *10 U.S.C.S. § 806b(a)(3)*, *(a)(7)*, and *(a)(9)*.

HN6 The Crime Victims' Rights Act permits a victim to seek enforcement of his or her rights in the federal district court in which the relevant case is being prosecuted. *18 U.S.C.S. § 3771(d)(3)*. If such a victim is denied relief, he or she may petition the court of appeals for a writ of mandamus.

Military & Veterans Law > ... > Courts Martial > Pretrial Proceedings > Investigations

HN7 **Pretrial Proceedings, Investigations**

Unlike the Crime Victims' Rights Act, the Unif. Code Mil. Justice art. 6b, 10 U.S.C.S. § 806b, provision does not contemplate a petitioner first raising the matter to trial court.

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Appeal by United States

Military & Veterans Law > Military Justice > Judicial Review > Finality

HN8 **Trial Procedures, Appeal by United States**

Congress has specified that a victim may seek a writ of mandamus from the Courts of Criminal Appeals under *Unif. Code Mil. Justice art. 6b(e), 10 U.S.C.S. § 806b(e)*.

HN9 In military justice cases, a subpoena may not be used to compel a civilian to travel outside the United States and its territories.

Military & Veterans Law > ... > Admissibility of Evidence > Hearsay Rule & Exceptions > Declarants Unavailable to Testify

Military & Veterans Law > ... > Witnesses > Compulsory Attendance of Witnesses > Interrogation & Presentation

Military & Veterans Law > ... > Courts Martial > Evidence > Preliminary Questions

Military & Veterans Law > ... > Trial Procedures > Witnesses > Expert Testimony

Military & Veterans Law > ... > Courts Martial > Sentences > Deliberations, Instructions & Voting

HN10 **Hearsay Rule & Exceptions, Declarants Unavailable to Testify**

The unavailability of a witness is generally a prerequisite for introducing testimonial evidence by means other than that witness's live testimony. Such a witness's prior testimony may be introduced under Mil. R. Evid. 804(b)(1), Manual Courts-Martial. Similarly, a party may seek a continuance to facilitate the availability of an essential witness. Mil. R. Evid. 906(b)(1), Manual Courts-Martial.

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Appeal by United States

Military & Veterans Law > ... > Courts Martial > Sentences > Cruel & Unusual Punishment

Military & Veterans Law > Military Justice > Courts Martial > Court-Martial Member Panel

Military & Veterans Law > ... > Courts Martial > Pretrial Proceedings > Investigations

Military & Veterans Law > Military Justice > Courts Martial > Convening Authority

HN11 **Trial Procedures, Appeal by United States**

A petitioner has the right to observe the accused's court-martial, and—as a named victim—has the right not to be excluded from those proceedings unless her testimony would be materially altered by virtue of watching the court-martial. Unif. Code Mil. Justice art. 6b(a)(3), *10 U.S.C.S. § 806b(a)(3)*.

Military & Veterans Law > Military Justice > Apprehension & Restraint of Civilians & Military Personnel > Arrests

Military & Veterans Law > Military Justice > Apprehension & Restraint of Civilians & Military Personnel > Circumstances Warranting Confinement & Restraint

Military & Veterans Law > ... > Evidence > Admissibility of Evidence > Sex Offenses

Military & Veterans Law > Military Justice > Apprehension & Restraint of Civilians & Military Personnel > Unlawful Restraint

HN12 **Apprehension & Restraint of Civilians & Military Personnel, Arrests**

Unif. Code Mil. Justice art. 6b(a)(4), *10 U.S.C.S. § 806b(a)(4)* entitles a victim to be reasonably heard at: (1) pretrial confinement hearings; (2) sentencing hearings; and (3) clemency and parole hearings. Mil. R. Evid. 412(c)(2), Manual Courts-Martial requires that victims be afforded the opportunity to attend and be heard at hearings related to the admissibility of evidence of his or her sexual behavior or predisposition.

Military & Veterans Law > ... > Courts Martial > Judges > Challenges to Judges

Military & Veterans Law > Military Justice > Courts Martial > Court-Martial Member Panel

Military & Veterans Law > Military Justice > Apprehension & Restraint of Civilians & Military Personnel > Unlawful Restraint

HN13 **Judges, Challenges to Judges**

Victims involved in court-martial proceedings do not have the authority to challenge every ruling by a military judge with which they disagree; but they may assert their rights enumerated in *Unif. Code Mil. Justice art. 6b, 10 U.S.C.S. § 806b*, and under other applicable laws.

HN14 With respect to the Crime Victims' Rights Act, federal courts have found victims' fairness rights implicated by such matters as delays in ruling on victim's motions, venue choice, court decisions to dismiss indictments, and preventing court observers from seeing sexually explicit videos of victims. If decisions on venue choice and the dismissal of charges impact a victim's right to be treated with fairness, then there seems to be little argument that court rulings which impact the nature and quality of a victim's legal representation similarly impact that right. This is especially true in light of the fact Congress has required the military services to provide legal counsel to victims of sex-related offenses. *10 U.S.C.S. § 1044e*.

Counsel: For Petitioner: Captain Taracina R. Bintliff, USAF; Devon A. R. Wells, Esquire.

For Respondent: Major Brittany M. Speirs, USAF; Mary Ellen Payne, Esquire.

For Real Party of Interest: Major Heather M. Caine, USAF; Captain Cynthia A. McGrath, USAF.

Judges: Before KEY, ANNEXSTAD, and GRUEN, Appellate Military Judges. Senior Judge KEY delivered the opinion of the court, in which Judge ANNEXSTAD and Judge GRUEN joined.

Opinion by: KEY

Opinion

PUBLISHED OPINION OF THE COURT

KEY, Senior Judge:

On 21 October 2022, Petitioner—the alleged victim in the proceedings below—requested this court issue a writ of mandamus vacating a military judge's decision to deny a Government-requested continuance. Petitioner further asked us to find that her access to an attorney should be considered when assessing her availability as a witness at trial "and that her rights may not be used as a sword of the accused." This court docketed the petition on 24 October 2022. We granted the Government and the real party in interest ("the accused") leave to file an answer to the petition and Petitioner the option to file a reply to those answers. Having **[*2]** considered the petition, the answers, and Petitioner's reply, we decline to order the requested relief.

I. Background

The accused is currently facing various charges of sexually assaulting Petitioner in violation of *Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920*. According to documents submitted by Petitioner, an assistant trial counsel notified the Air Force Central Docketing Office on 14 September 2022 that the parties had agreed to an arraignment and motions hearing date of 28 February 2023 and a trial date of 13 March 2023 at Spangdahlem Air Base, Germany. The accused's court-martial was subsequently docketed for those dates.

On 23 September 2022, the Government made a motion for a continuance, proposing either to move the trial date earlier—so that trial occurred immediately after motions—or to move the trial date later, specifically to 8 May 2023. According to the Government, this later date is the Defense's "next ready date."

In its motion, the Government indicated that "Government Counsel" learned on 15 September 2022 that neither circuit trial counsel nor Captain (Capt) Bintliff—Petitioner's victims' counsel—were available for the trial date, as they were both detailed to another court-martial scheduled for the same time. **[*3]** The Government further asserted:

> On 15 September 2022, Captain Bintliff consulted with her client, [Petitioner], to determine whether she could be released to accommodate the trial date. [Petitioner] declined to release her representation and stated she was unavailable for the scheduled date. In addition, Captain Bintliff notified the Government that all other Victims' Counsel in Europe were docketed for the same conflicting trial.

No evidence was attached to the motion, and the Government did not request a hearing on the matter. The Government primarily based its motion on the premise that Petitioner is an essential witness, is unavailable, and that the Government lacks subpoena power over her "while she is overseas."

On 30 September 2022, the accused, through counsel, opposed the continuance, objecting to both of the Government's proposed new trial dates. The Defense contended the earlier date would not allow for adequate preparation time and that the later date prejudiced the accused's speedy trial rights. In its response to the motion, the Defense alleged: "[Petitioner] does not have a personal conflict to the trial dates. . . . She is voluntarily deeming herself unavailable because **[*4]** Capt Bintliff is not available due to Capt Bintliff docketing in another proceeding." In support of this point, trial defense counsel attached a short text message in which Capt Bintliff wrote: "My client will not appear without counsel and she will not get another attorney, so she is personally unavailable for that date." Like the Government, the Defense did not request a hearing on the motion.

The military judge issued a written ruling denying the Government's motion on 3 October 2022. The military judge concluded the Government had failed to establish, by a preponderance of the evidence, that either the circuit trial counsel or Petitioner were unavailable for the court-martial dates, and that Petitioner's victims' counsel's unavailability did not operate to render Petitioner unavailable. He wrote: "Certainly, [Petitioner]

can refuse to release her unavailable [victims' counsel], and refuse to participate without her current [victims' counsel]. Those, however, are personal preferences that do not render her unavailable for trial." The military judge determined the Government had not proven Petitioner was actually unavailable, and the Government, therefore, had failed to prove its **[*5]** "essential" evidence was unavailable.

Pointing to this court's ruling in *In re HK, Misc. Dkt. No. 2021-07, 2021 CCA LEXIS 535 (A.F. Ct. Crim. App. 13 Sep. 2021)* (order), *rev. denied, H.K. v. Eichenberger, 82 M.J. 123 (C.A.A.F. 2022)*, the military judge asserted that *Article 6b, UCMJ, 10 U.S.C. § 806b*, does not give a victim (or his or her counsel) the right to request a continuance based on the counsel's schedule, and that it appeared Petitioner's victims' counsel was "attempting to drive a continuance based on her non-availability." The military judge also noted that granting the continuance would "deprive [Petitioner] of her right to proceedings free from unreasonable delay" under *Article 6b(a)(7), UCMJ*.

Before this court, Petitioner argues the military judge violated her right to be "treated with fairness and with respect for [her] dignity" under *Article 6b(a)(8), UCMJ*, by: (1) not considering Petitioner's unwillingness to appear at trial without the presence of her counsel, and (2) using Petitioner's "right to proceedings free from unreasonable delay" under *Article 6b(a)(7), UCMJ*, against her. Petitioner further argues we should employ an "abuse of discretion" standard of review in assessing her petition as opposed to the standard commonly applied for mandamus petitions. The Government avers Petitioner has established neither that we have jurisdiction to hear her claim[1] nor that she was treated unfairly. The accused **[*6]** takes the position that Petitioner has not identified any legal right of hers which was violated. Both the Government and the accused oppose Petitioner's view regarding the appropriate standard of review and maintain Petitioner has not met her burden to warrant the issuance of a writ of mandamus.

[1] On this point, the Government argues we only have jurisdiction over *Article 6b, UCMJ*, mandamus petitions in which a petitioner presents a "legitimate claim" of a violation of a victim's rights (as opposed to a perceived violation). ***HN1***[↑] However, *Article 6b(e)(1), UCMJ*, specifically permits a petition when a victim "believes" a violation has occurred.

II. Law

HN2[↑] This court has jurisdiction over a petition under *Article 6b, UCMJ*, which establishes a victim's ability to petition this court for a writ of mandamus when the victim "believes . . . a court-martial ruling violates the rights of the victim afforded" by that article. *Article 6b(e)(1), UCMJ*, *10 U.S.C. § 806b(e)(1)*. If granted, such a writ would require compliance with *Article 6b, UCMJ*. *Id.*

HN3[↑] A writ of mandamus "is a drastic and extraordinary remedy reserved for really extraordinary cases." *EV v. United States, 75 M.J. 331, 332 (C.A.A.F. 2016)* (quoting *Cheney v. United States Dist. Court for D.C., 542 U.S. 367, 380, 124 S. Ct. 2576, 159 L. Ed. 2d 459 (2004)*). "Extraordinary writs serve 'to confine an inferior court to a lawful exercise of its prescribed jurisdiction.'" *LRM v. Kastenberg, 72 M.J. 364, 367 (C.A.A.F. 2013)* (quoting *Bankers Life & Casualty Co. v. Holland, 346 U.S. 379, 382, 74 S. Ct. 145, 98 L. Ed. 106 (1953)*). A military judge's decision warranting reversal via a writ of mandamus "must amount to more than even gross error; it must amount to a judicial usurpation of power . . . or be characteristic of an erroneous practice which is likely to recur." *United States v. Labella, 15 M.J. 228, 229 (C.M.A. 1983)* (per curiam) (internal quotation marks and citations omitted).

HN4[↑] In order to prevail on a petition for **[*7]** a writ of mandamus, a petitioner "must show that: (1) there is no other adequate means to attain relief; (2) the right to issuance of the writ is clear and indisputable; and (3) the issuance of the writ is appropriate under the circumstances." *Hasan v. Gross, 71 M.J. 416, 418 (C.A.A.F. 2012)* (per curiam) (citing *Cheney, 542 U.S. at 380-81*).

III. Analysis

HN5[↑] *Article 6b, UCMJ*, sets out rights held by victims of offenses under the UCMJ. Three specific rights are relevant here: (1) the right not to be excluded from court-martial proceedings;[2] (2) the right to proceedings free from unreasonable delay;[3] and (3) the "right to be treated with fairness and with respect for the

[2] *Article 6b(a)(3), UCMJ*.

[3] *Article 6b(a)(7), UCMJ*.

dignity and privacy of the victim."[4]

Petitioner makes a number of interrelated arguments. First, Petitioner contends a petition for a writ of mandamus under *Article 6b, UCMJ*, should be analyzed under an "abuse of discretion" standard of review rather than the typical standard, as adopted in *Hasan, 71 M.J. at 418*. Second, she asserts the military judge erred in not granting the Government's requested continuance because, in Petitioner's view, the military judge both incorrectly found her "available" for trial and gave unwarranted credence to the accused's demand for a speedy trial—a demand which Petitioner decries as "disingenuous." Third, she claims the **[*8]** military judge did not give appropriate consideration to her victims' counsel's schedule, and that his ruling essentially amounts to unfairly forcing her to sever her attorney-client relationship with her victims' counsel. Fourth, she contends the military judge erred by factoring Petitioner's right to proceedings free from unreasonable delay into his analysis of whether a continuance should be granted—a continuance which Petitioner supported.

A. Writ of Mandamus Standard of Review

Petitioner contends we should review the military judge's decision for abuse of discretion (or, alternatively, "legal error") rather than under the typical "extraordinary relief" mandamus standard. Petitioner's argument is premised on a 2015 modification to the *Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771*.

HN6[↑] The CVRA, originally passed in 2004, permits a victim to seek enforcement of his or her rights in the federal district court in which the relevant case is being prosecuted. *18 U.S.C. § 3771(d)(3)*. If such a victim is denied relief, he or she may petition the court of appeals for a writ of mandamus. *Id.* *Article 6b, UCMJ*, was enacted to extend victims' rights to victims of offenses under the UCMJ in 2013, but it did not include any sort of enforcement provision. *See National Defense Authorization Act (NDAA) for Fiscal Year 2014, Pub. L. No. 113-66, § 1701, 127 Stat. 672 (2013)*. In the years following **[*9]** the CVRA's passage, a split of opinion developed in the federal circuits over what standard of review applied in mandamus petitions brought under the law. *Compare, e.g., In re Dean, 527 F.3d 391, 394 (5th Cir. 2008)* (per curiam) (applying usual mandamus standards to a CVRA appeal); *In re Antrobus, 519 F.3d 1123, 1130 (10th Cir. 2008)* (order) (same); *with Kenna v. United States Dist. Court, 435 F.3d 1011, 1017 (9th Cir. 2006)* (declining to apply usual mandamus standards); *In re W.R. Huff Asset Mgmt. Co., 409 F.3d 555, 562-63 (2d Cir. 2005)* (same). In May 2015, Congress amended the CVRA, specifically *18 U.S.C. § 3771(d)(3)*, by adding the following language: "In deciding such application, the court of appeals shall apply ordinary standards of appellate review."[5] *See, e.g., In re Wild, 994 F.3d 1244, 1252 n.8 (11th Cir. 2021)*, *cert. denied sub. nom. Wild v. United States Dist. Court, 142 S. Ct. 1188, 212 L. Ed. 2d 54 (2022)*.

Six months later, in November 2015, Congress amended *Article 6b, UCMJ*, to add an enforcement mechanism, granting victims the ability to petition a Court of Criminal Appeals for a writ of mandamus in the event of an alleged violation of any of the eight rights set out in the act, as well as for alleged violations of Mil. R. Evid. 412 and Mil. R. Evid. 513. NDAA for Fiscal Year 2015, *Pub. L. No. 113-291 § 535, 128 Stat. 3292 (2014)*. ***HN7***[↑] Unlike the CVRA provision, the *Article 6b, UCMJ*, provision does not contemplate a petitioner first raising the matter to trial court. Also absent from *Article 6b, UCMJ*, is any indication that "ordinary standards of appellate review" were intended to supplant the traditional extraordinary relief standard. The fact this language was not included in **[*10]** the *Article 6b, UCMJ*, amendments just months after it was added to the CVRA is an indication Congress has provided different standards of review for mandamus petitions brought under the two laws.

HN8[↑] Congress has specified that a victim may seek a "writ of mandamus" from the Courts of Criminal Appeals under *Article 6b(e), UCMJ*. Giving effect to the plain meaning of the words of the statute and the longstanding standard for a petitioner to secure mandamus relief, we conclude Petitioner bears the burden to meet the traditional mandamus standard as set out in *Hasan, 71 M.J. at 418*, and not the abuse of discretion standard which Petitioner encourages us to adopt.

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[4] *Article 6b(a)(9), UCMJ*.

[5] At the time of this amendment, Senator Diane Feinstein explained in the Senate Record that the provision was meant to resolve the circuit split and to avoid "imposing an especially high standard for reviewing appeals by victims, requiring them to show 'clear and indisputable error'" instead of "the ordinary appellate standard of legal error or abuse of discretion." 160 Cong. Rec. S6149, 6150 (daily ed. 19 Nov. 2014).

B. The Military Judge's Determination of Petitioner's Availability

Petitioner's second argument is largely rooted in the question of whether she is "unavailable" for the set court-martial date. Based upon the record before us, Petitioner has said she is unwilling to voluntarily participate in the accused's court-martial as currently scheduled because her victims' counsel cannot attend. *HN9*[] Due to the overseas situs of the court-martial, there is no subpoena power to compel Petitioner's presence. *See* Rule for Courts-Martial (R.C.M.) 703(g), Discussion ("A subpoena may not be used to compel a civilian to travel outside the United States **[*11]** and its territories."). Assuming Petitioner's victims' counsel will not be present at the accused's court-martial, and assuming Petitioner stands fast on her position that she will not testify without her counsel's presence, Petitioner may very well be unavailable for the purposes of that trial. How this translates into a violation of Petitioner's rights or warrants relief for Petitioner is less apparent.

HN10[] The unavailability of a witness is generally a prerequisite for introducing testimonial evidence by means other than that witness's live testimony. For example, such a witness's prior testimony may be introduced under Mil. R. Evid. 804(b)(1). Similarly, a party may seek a continuance to facilitate the availability of an essential witness. R.C.M. 906(b)(1), Discussion. But these options do not confer any rights upon witnesses or persons of limited standing; instead, they are remedies available to the parties regarding the presentation of their respective cases.

Although we presume Petitioner would be a key witness in the accused's court-martial, Petitioner has not identified any obligation—and we are aware of none—that either party call her to testify. Petitioner has also not alleged any matters will be raised at the court-martial **[*12]** which would trigger her independent rights to participate in the proceedings.[6] *HN11*[] Petitioner has the right to observe the accused's court-martial, and—as a named victim—she has the right not to be excluded from those proceedings unless her testimony would be "materially altered" by virtue of watching the court-martial. *Article 6b(a)(3), UCMJ*. But Petitioner also has the right—in the absence of process compelling her presence—to not attend the accused's court-martial, if she so chooses.

What Petitioner has not identified is any right to have the accused's court-martial dates set such that they accommodate either her or her victims' counsel's schedule. Instead, Petitioner's potential absence more directly impacts the ability of the Government to present its case, which is to say that if Petitioner's live testimony is important to the Government's case, then it is the Government which would seek relief in order to ensure Petitioner's presence. In this case, the Government requested a continuance for this very reason. That request was denied, and the Government has not sought relief from our court.[7] Just as Petitioner has no legal ability to force the Government to call her as a witness, *Article 6b, UCMJ*, does not provide **[*13]** Petitioner with authority to challenge—on the Government's behalf—the military judge's substantive ruling on the continuance motion with respect to such matters as her availability. *HN13*[] Victims involved in court-martial proceedings do not have the authority to challenge every ruling by a military judge with which they disagree; but they may assert their rights enumerated in *Article 6b, UCMJ*, in the *Manual for Courts-Martial*, and under other applicable laws.

C. Petitioner's Victims' Counsel's Availability

Petitioner argues that the military judge's denial of the Government's continuance request requires her to sever her attorney-client relationship with her victims' counsel. This, however, is a mischaracterization of the military judge's ruling. That ruling has resulted in the accused's trial still being scheduled for the same time as another trial in which Petitioner's victims' counsel is involved. Thus, the ruling means Petitioner's victims' counsel will potentially be unavailable to attend the accused's trial in person if she is obligated to be elsewhere. Even so, Petitioner remains, at a minimum, free to retain counsel

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[6] *HN12*[] *Article 6b(a)(4), UCMJ*, entitles a victim to be reasonably heard at: (1) pretrial confinement hearings; (2) sentencing hearings; and (3) clemency and parole hearings. *See also* Mil. R. Evid. 412(c)(2) (requiring victims be afforded the opportunity to attend and be heard at hearings related to the admissibility of evidence of his or her sexual behavior or predisposition); Mil. R. Evid. 513(e)(2) (same in cases regarding patients' communications with psychotherapists); Mil. R. Evid. 514(e)(2) (same in cases regarding victims' communications with victim advocates). Should the accused be convicted, Petitioner would have the right to make a sworn or unsworn statement under Rule for Courts-Martial 1001(c), but whether there will be a conviction is speculative at this point.

[7] Notably, the Government does not join Petitioner's request that the military judge's ruling be vacated.

who is available to be present at the accused's court-martial instead of—or in addition **[*14]** to—her current counsel; or she can continue with her current attorney-client relationship and participate in the accused's court-martial despite her counsel's inability to be physically present. We appreciate Petitioner's desire to have her currently assigned counsel present at the accused's court-martial. We also appreciate Petitioner's understandable desire to avoid having to forge a new relationship with an unfamiliar counsel. Yet, these desires do not transform the military judge's denial of the continuance into a requirement that Petitioner must sever her existing attorney-client relationship.

The real crux of Petitioner's argument here is her assertion that the military judge did not treat her with fairness as required by *Article 6b(a)(9), UCMJ*. Petitioner contends the military judge did not consider her counsel's scheduling conflicts, but his ruling refutes this claim—the military judge *did* recognize Petitioner's victims' counsel had a conflict, but he determined that conflict did not render Petitioner unavailable or otherwise justify delaying the accused's court-martial. Petitioner seems to actually be arguing that a "fair" consideration of her counsel's projected inability to be personally present **[*15]** for the accused's court-martial would have resulted in the granting of the continuance motion. Alternatively, Petitioner may be arguing that granting the continuance would have been tantamount to treating Petitioner "with fairness." Petitioner points to no legal precedent supporting either conclusion.

The first hurdle Petitioner faces is defining what "fairness" means for a victim involved in a court-martial. There is little military precedent regarding the "with fairness" provision found in *Article 6b, UCMJ*, with one court finding that the provision does not entitle victims to a right to receive discovery (at least "without an analysis of the case status and pending legal issue"). *AG v. Hargis, 77 M.J. 501, 504 (A. Ct. Crim. App. 2017)*. ***HN14***[] With respect to the CVRA, federal courts have found victims' fairness rights implicated by such matters as delays in ruling on victim's motions, *In re Simons, 567 F.3d 800, 801 (6th Cir. 2009)* (order); venue choice, *United States v. Kanner, No. 07-CR-1023-LRR, 2008 U.S. Dist. LEXIS 108345, at *22 (N.D. Iowa 2008)* (order); court decisions to dismiss indictments, *United States v. Heaton, 458 F.Supp.2d 1271, 1272 (D. Utah 2006)* (mem.); and preventing court observers from seeing sexually explicit videos of victims, *United States v. Kaufman, Nos. 04-40141-01, 02, 2005 U.S. Dist. LEXIS 23825, at *5 (D. Kan. 2005)* (mem. and order). If decisions on venue choice and the dismissal of charges impact a victim's right to be treated with fairness, then there seems to be little argument that court rulings which impact the nature and **[*16]** quality of a victim's legal representation similarly impact that right. This is especially true in light of the fact Congress has required the military services to provide legal counsel to victims of sex-related offenses. *See 10 U.S.C. § 1044e*.[8]

While we conclude a victim's legal representation falls within the ambit of a victim's right to fairness, Petitioner does not convincingly explain how that fact leads to the conclusion that the military judge's ruling was wrong or violated her rights. Even those cases identifying particular issues touching on victims' fairness rights do not conclude the lower courts were required to rule a particular way—just that the rights were valid considerations in deciding the issues at hand. Similarly, we conclude that in the context of a motion for a continuance, Petitioner's right to be treated with fairness does not entitle her to a trial date of her choosing, but is rather a factor for the military judge to consider in balancing competing interests and making scheduling decisions. Given the accused has a constitutional right to a speedy trial, and he has asserted that right, Petitioner's argument that the case should be delayed for her benefit definitely faces strong **[*17]** headwinds. Here, the military judge did consider Petitioner's counsel's unavailability, but took issue with the Government's theory that this rendered Petitioner personally unavailable. The military judge ultimately concluded the Government had failed to prove that Petitioner was actually unavailable, as the Government failed to carry its evidentiary burden.[9] Thus, the military judge's ruling can be read to say more about the quality of the Government's presentation than the dilemma the scheduling confusion had created for Petitioner. In the end, the military judge's ruling on the matter was well within his discretion, and far from a "judicial usurpation of power" or even "an erroneous practice."

D. Petitioner's Right to Proceedings Free from

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[8] Petitioner asserts she is a dependent of an active-duty service member, and therefore entitled to be detailed a victims' counsel. Neither the Government nor the accused dispute this point.

[9] The military judge went so far as to bold and underline the word "proffered" when explaining what information had been presented by the Government before finding there was "no evidence" Petitioner was unavailable for trial. No other words in the ruling received similar emphasis.

Unreasonable Delay

Like Petitioner, we are troubled by the military judge's invocation of *Petitioner's* right to proceedings free from unreasonable delay as a reason to deny a continuance which Petitioner plainly supported. Our concern is compounded by the fact that Petitioner was supporting the continuance for the purpose of ensuring in-person legal representation by her detailed victims' counsel—a reason which falls within the ambit of her right **[*18]** to be treated with fairness. We think it would be entirely reasonable to conclude that Petitioner's support of the continuance meant she did not believe the continuance would amount to unreasonable delay or that she wished to waive the matter. The military judge did not provide any substantive analysis of this point; instead, the last line of his written ruling simply reads: "Pursuant to *Article 6b(7)* [sic], granting the Government's motion would also deprive the named victim of her right to proceedings free from unreasonable delay." This leads us to conclude that this point was not a key factor in the military judge's analysis, but was instead an observation, albeit one of questionable validity. Had this been the sole reason—or at least the driving force—for the military judge's denial of the motion, we might have greater concern regarding the degree to which he treated Petitioner with fairness, but we conclude that is not the case here. The bulk of the military judge's analysis focuses on the Government's failure to prove Petitioner's unavailability as well as the accused's speedy trial rights.

IV. CONCLUSION

Based on the foregoing, Petitioner has not demonstrated that the right to issuance of **[*19]** the writ she seeks is clear and indisputable, and she has therefore failed to show the appropriateness of the relief she requests.

Accordingly, the Petition for Writ of Mandamus dated 21 October 2022 is **DENIED.**

In re VM

United States Air Force Court of Criminal Appeals

July 11, 2023, Decided

Misc. Dkt. No. 2023-04

Reporter
2023 CCA LEXIS 290 *; 2023 WL 4448010

In re VM, Petitioner, Christopher P. MARTINEZ, Technical Sergeant (E-6), U.S. Air Force, Real Party in Interest

Notice: NOT FOR PUBLICATION

Prior History: **[*1]** Petition for Extraordinary Relief in the Nature of a Writ of Mandamus. Military Judge: Matthew P. Stoffel. GCM convened at: Joint Base Elmendorf Richardson, Alaska.

Counsel: For Petitioner: Captain Bryant A. Mishima-Baker, USAF; Devon A. R. Wells, Esquire.

For Respondent: Captain Olivia B. Hoff, USAF; Mary Ellen Payne, Es-quire.

Judges: Senior Judge RICHARDSON delivered the opinion of the court, in which Judge CADOTTE and Judge ANNEXSTAD joined.

Opinion by: RICHARDSON

Opinion

RICHARDSON, Senior Judge:

On 30 May 2023, Petitioner requested this court issue a writ of mandamus vacating the trial judge's decision to grant a defense-requested continuance of the scheduled court date. Petitioner further asked us to mandate that the trial judge consider her inputs in making his ruling on the defense request.

When this court docketed the petition on 31 May 2023, we required the Government provide this court with the Prosecution's response to the defense motion to continue; on 8 June 2023, the Government complied. We also granted the Government and the Real Party in Interest leave to file answers to the petition, and granted Petitioner leave to file a reply to those answers. We received an answer from the Government, and Petitioner's reply **[*2]** to that answer on 21 and 28 June 2023, respectively; we did not receive an answer from the Real Party in Interest. Having considered the petition, the answer, and the reply, we find Petitioner is not entitled to the requested relief.

I. Background

On 15 July 2022, two charges against the Real Party in Interest ("the accused") were referred to a general court-martial. Specifically, the accused is charged with one specification of abusive sexual contact against VM in violation of *Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920*, and six specifications of battery against VM—the accused's wife—and two specifications of battery against a child, in violation of *Article 128, UCMJ, 10 U.S.C. § 928*.[1] The specifications allege misconduct from January 2015 through March 2021. By agreement of the parties, the initial trial date was set for 12 June 2023.

Appellant retained new counsel, Mr. CH, who filed a notice of appearance with the trial court on 17 April 2023. On 19 April 2023, the Defense filed a motion to continue the trial to a date no earlier than 1 August 2023. On the same date, Mr. CH clarified that his appearance was limited to his request for a continuance, as he would not be able to represent the accused if the request was denied. **[*3]**

The Prosecution opposed the defense motion in writing on 24 April 2023. The Prosecution asserted as fact that

> On 24 April 2023, counsel for named victim [VM] provided a memo from [VM] in which she states she suffered pecuniary loss from the long waiting period before trial and expect[s] to suffer further loss if there is any further delay. The loss is due to legal fees because the Accused's divorce from [VM] has been continued due to the court-martial. (Att. 6)

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[1] Unless otherwise noted, all references in this opinion to the UCMJ are to the *Manual for Courts-Martial, United States* (2019 ed.).

The referenced "Att. 6" consists of a statement signed by VM and a state-court listing of the progress of the accused's and VM's divorce proceeding.[2] In the statement, VM explains how a delay will affect her and her family mentally, emotionally, and financially.

The Prosecution argued that a delay would cause prejudice to the Government's "search for truth" and "directly affects the victims in this case. . . . The victims have vested Article 6b[, UCMJ,] rights in a trial without unreasonable delay." Further, the Prosecution devoted one paragraph to asserting VM's position on the defense motion:

> Victim's counsel for [VM] has notified the Government that [VM] will suffer undue hardship because of a continuance. Specifically, that [VM] **[*4]** will be required to retain the services of a lawyer for [a]ccused's divorce from her for a longer period because the court handling the divorce will not finalize the divorce until this court-martial is complete. The Government notes both victim's [sic] rights to proceedings "free from unreasonable delay." *Art[icle] 6b(a)(5), UCMJ* [sic]. The continuance of this trial will create an unreasonable delay because the [a]ccused currently has three attorneys representing him including the civilian defense counsel of his choosing.

Neither party requested a hearing under *Article 39(a), UCMJ, 10 U.S.C. § 839(a)*. The military judge considered the parties' filings, but did not consider the separate responses from the detailed victims' counsel for VM and the child. Citing *In re HK, 2021 CCA LEXIS 535 (A.F. Ct. Crim. App. 22 Oct. 2021)* (order), the military judge explained in a footnote: "This court received the responses but did not consider them due to lack of standing before this trial court." VM's counsel's response totaled 49 pages, comprised of an 8-page document from counsel and 7 attachments, including VM's memorandum and attachment.[3] VM's counsel asserted the Defense had not established a reasonable basis for a continuance; a continuance is not just as it violates VM's *Article 6b, UCMJ*, rights; and the accused's interest in "convenience" **[*5]** does not outweigh VM's *Article 6b, UCMJ*, rights.

In an email on 3 May 2023, the military judge informed the parties he would be granting the defense motion. He issued a written ruling to that effect on 9 May 2023. In his ruling, the military judge found as fact:

> [VM], one of the alleged victims, is in the midst of divorce proceedings involving the accused. The next scheduled court date for the divorce proceedings is 22 June 2023. It is likely that a continuance of the accused's court-martial will result in delay of the civilian divorce proceedings.

The military judge ended his conclusions of law as follows:

> While a continuance may cause emotional difficulty and expenditure of additional legal fees for one of the named victims, she remains available for trial and is willing to participate. Taking these factors into account, and in consideration of the fundamental nature of the accused's right to be represented by civilian counsel at no expense to the [G]overnment, the court concludes granting a continuance is just under the circumstances.

The military judge set 25 July 2023 as the date for arraignment and to hear motions. He set a new trial date of 28 August 2023. The instant petition followed, in which **[*6]** Petitioner asks us to vacate the military judge's decision to continue the scheduled court date and to mandate the military judge consider VM's inputs in making a decision on the Defense's motion.

II. Law

"This court has jurisdiction over a petition under *Article 6b, UCMJ*, which establishes a victim's ability to petition this court for a writ of mandamus when the victim 'believes . . . a court-martial ruling violates the rights of the victim afforded' by that article." *In re KK, M.J. , Misc. Dkt. No. 2022-13, 2023 CCA LEXIS 31, at *6 (A.F. Ct. Crim. App. 24 Jan. 2023)* (omission in original) (quoting *Article 6b(e)(1), UCMJ, 10 U.S.C. § 806b(e)(1)*). "If granted, such a writ would require compliance with *Article 6b, UCMJ*." *Id.*

The purpose of a writ of mandamus is to "confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." *Roche v. Evaporated Milk*

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[2] "Att 6" is the same document Petitioner submitted with this writ petition as "Attachment 8." The documents are identical except Petitioner's submission does not have redactions of personal information. Moreover, while the subject of VM's statement begins "Affidavit," the document is not sworn.

[3] The other attachments are: (1) excerpt from report of investigation, (2) charge sheet, (3) excerpt from preliminary hearing report, (4) emails regarding the initial scheduling of the court-martial, (5) Defense's motion to continue, and (6) Mr. CH's notice of appearance.

Association, 319 U.S. 21, 26, 63 S. Ct. 938, 87 L. Ed. 1185 (1943) (citations omitted). A writ of mandamus "is a 'drastic and extraordinary' remedy 'reserved for really extraordinary cases.'" EV v. United States, 75 M.J. 331, 332 (C.A.A.F. 2016) (quoting Cheney v. United States Dist. Court for D.C., 542 U.S. 367, 380, 124 S. Ct. 2576, 159 L. Ed. 2d 459 (2004)).

In order to prevail on a petition for a writ of mandamus, a petitioner "must show that: (1) there is no other adequate means to attain relief; (2) the right to issuance of the writ is clear and indisputable; and (3) the issuance of the writ is appropriate under the circumstances." Hasan v. Gross, 71 M.J. 416, 418 (C.A.A.F. 2012) (per curiam) (citing Cheney, 542 U.S. at 380-81 **[*7]**); *see also* In re KK, 2023 CCA LEXIS 31, at *9-10 (rejecting abuse of discretion as the standard to determine mandamus relief and endorsing the traditional mandamus standard in Hasan).

"A military judge's decision warranting reversal via a writ of mandamus 'must amount to more than even gross error; it must amount to a judicial usurpation of power . . . or be characteristic of an erroneous practice which is likely to recur.'" In re KK, 2023 CCA LEXIS 31, at *6 (omission in original) (quoting United States v. Labella, 15 M.J. 228, 229 (C.M.A. 1983) (per curiam)).

"Victims involved in court-martial proceedings do not have the authority to challenge every ruling by a military judge with which they disagree; but they may assert their rights enumerated in Article 6b, UCMJ, in the *Manual for Courts-Martial*, and under other applicable laws." *Id.* at *13. In the context of a motion for a continuance, a victim's rights under Article 6b, UCMJ, to proceedings free from unreasonable delay and to be treated with fairness do "not entitle her to a trial date of her choosing," but are "factor[s] for the military judge to consider in balancing competing interests and making scheduling decisions." *Id.* at *16-18.

III. Analysis

Petitioner makes two requests of this court: (1) vacate the military judge's order delaying the scheduled court date, and (2) require the military judge consider VM's inputs in making a decision on the Defense's motion. We find no writ should issue.

Article 6b, UCMJ, delineates eight victim **[*8]** rights, and only one of those rights—Article 6b(a)(4)—specifically provides for an opportunity to be heard. As such, Petitioner does not have a statutory right to be heard on the rights she has asserted in this petition—to proceedings free from unreasonable delay and to be treated with fairness under Articles 6b(a)(7) and (8), UCMJ. Petitioner does not assert a non-statutory right to be heard.

Importantly, absence of a specific statutory right to be heard does not mean that a military judge is *prohibited* from considering a victim's effort to exercise Article 6b, UCMJ, rights. To the extent the military judge in this case believed otherwise based on the unpublished order In re HK, he was mistaken, but any such mistake in this case is not dispositive on the issues before us.

The military judge denied VM the opportunity to be heard through counsel, but otherwise allowed her exercise of rights to proceedings free from unreasonable delay and to be treated with fairness under Article 6b, UCMJ. VM was not entitled "to a trial date of her choosing," but her circumstances were "factor[s] for the military judge to consider in balancing competing interests and making scheduling decisions." In re KK, 2023 CCA LEXIS 31, at *16-18. The military judge considered VM's personal statement and its attachment, as **[*9]** well as the argument from the Prosecution on VM's behalf. He considered how a delay would affect VM and her family. He balanced VM's rights with the accused's rights, and ultimately ruled in favor of the accused.

IV. Conclusion

For the foregoing reasons, Petitioner has not demonstrated that the right to issuance of the writ she seeks is clear and indisputable, and she has therefore failed to show the appropriateness of the relief she requests.

Accordingly, the Petition for Writ of Mandamus dated 30 May 2023 is **DENIED**.

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UNITED STATES v. CARTER

United States Navy-Marine Corps Court of Military Review

November 25, 1985

Misc. Dkt. No. 85-14

Reporter
1985 CMR LEXIS 3051 *

UNITED STATES, Appellant v. Bruce B. CARTER, 061 44 3936, Hospitalman (E-3), U.S. Navy, Appellee

Counsel: [*1] LCDR R. CLAYTON SEAMAN, JR., JAGC, USN, Appellate Government Counsel; MAJ MICHAEL E. CANODE, USMC, Appellate Defense Counsel; LT LEONARD R. CLEAVELIN, JAGC, USNR, Appellate Defense Counsel

Judges: BEFORE JOHN E. GRANT, JR.; JOHN W. KERCHEVAL II; MICHAEL D. RAPP

Opinion by: GRANT

Opinion

GENERAL COURT-MATIAL

OPINION OF THE U.S. NAVY-MARINE CORPS COURT OF MILITARY REVIEW ON THE APPEAL OF THE UNITED STATES

GRANT, Judge:

The trial judge at a general court-martial granted the appellee's motion to dismiss all charges involving drug possession and distribution in violation of Article 112(a), Uniform Code of Military Justice (UCMJ), and theft of drugs, in violation of Article 121, UCMJ, on grounds the court-martial lacked personal jurisdiction over the appellee. The government appealed the trial judge's decision under Article 62, UCMJ. In order to properly frame the issues before the trial judge, a summary of facts and the trial judge's findings of fact are appropriate.

SUMMARY OF FACTS

The undisputed facts are that a medical board was convened in March 1984 to inquire into whether the appellee was suffering from narcolepsy, a sleeping disorder, and an eye infection. In August 1984, the **[*2]** appellee requested terminal leave effective 30 November 1984 to dovetail with appellee's anticipated release from active duty on 4 January 1985 in accordance with the expiration of his active duty obligation (EAOS). The medical board, however, was not completed prior to appellee's EAOS, and without gaining his consent in accordance with the requirements of paragraph 1050155.1e of the Navy Military Personnel Manual, the appellee was extended on active duty beyond his EAOS for the purpose of completing medical proceedings. On 18 January 1985, the results of the medical board were forwarded via the Commanding Officer, Naval Hospital, Newport, and on 13 February 1985, the Commanding Officer approved the findings and forwarded the medical board proceedings for action by the Central Physical Evaluation Board. On 25 January 1985, the appellee was arrested by Newport, Rhode Island, civil authorities on drug charges for which he was subsequently arraigned on 30 January 1985. Civil authorities turned over to military authorities on 27 February 1985 the physical evidence seized on 25 January 1985 from the appellee which constituted the basis for the civilian arrest. A military laboratory **[*3]** tested the drugs and returned them to the command on 9 April 1985. Appellee was charged by military authorities on 15 March 1985, several days after the appellee orally notified the hospital Commanding Officer of his desire to terminate medical board proceedings and be released from active duty and one day after the appellee served written notice on the command to the same effect. The Article 32 investigation was convened on 15 April 1985 and completed on 23 April 1985. On 5 May 1985, the Article 32 Investigating Officer forwarded his recommendation that the charges be referred to a general court-martial. On 23 May 1985, the charges were referred to a general court-martial, and on 18 June 1985, the first Article 39(a) session was convened. The trial judge, on 6 August 1985, dismissed the charges for lack of personal jurisdiction over the appellee. At divers times before the after the expiration of appellee's EAOS, he discussed with various personnel in the command matters involving the disposition of the medical board proceedings and his desire to return to New York to be with his family. The content of such discussions was

disputed at trial.

In regard to the disputed evidence, **[*4]** appellee claims he approached persons in the command, including Captain C, his Commanding Officer, Commander H, his immediate superior officer, Chief C, the chief petty officer in charge of medical boards, and Master Chief G. the command master chief, for the purpose of gaining his release from active duty in accordance with the expiration of his enlistment contract. Until the last meeting with Captain C just before 14 March 1985, the appellee was not given any reason to believe he could be released from active duty pending medical board proceedings by any of the sources he consulted, although he expressed his desire to terminate the medical board proceedings and be released from active duty both before and after the expiration of his EAOS.

Government witnesses portrayed a different story. Commander H related that he spoke with appellee before the expiration of appellee's EAOS, at which time the appellee expressed only a desire to expedite the medical board proceedings so that he could be released from active duty, and at no time did he ever relate to Commander H a desire to terminate such proceedings and be released from active duty. Commander H advised the appellee that he could **[*5]** get out of the Navy without losing the right to apply to the Veterans Administration for disability, but appellee clearly indicated his desire that the medical board proceedings continue. Captain C acknowledged that conversations took place before and subsequent to appellee's EAOS regarding medical board proceedings and the appellee's release from active duty, but the appellee was only interested in expediting such proceedings so that he could be released from active duty, and not until their last meeting did appellee request terminating medical board proceedings. Thereafter, Captain C consulted with medical authorities on the matter and advised appellee that he could request termination of the proceedings. Shortly thereafter, on 14 March 1985, appellee requested in writing that the proceedings be terminated and that he be released from active duty. Other evidence of record revealed that Naval Investigative Service Agent L knew that appellee was allegedly involved in drug activity as early as December 1984, but no charges were preferred because of insufficient evidence. However, on 22 January 1985, Ms. B overdosed, and later named appellee as her supplier. She agreed to assist **[*6]** Agent L in a controlled buy, which was executed on 24 January 1985, at which time she turned over to NIS agents drugs allegedly obtained from appellee during the controlled buy. Civilian authorities were provided this evidence, and on 25 January 1985 allegedly discovered more drugs in appellee's possession pursuant to the execution of a search warrant. The stipulated testimony of Master Chief G represented that appellee, prior to 25 January 1985, did not advise Master Chief G that he, appellee, wanted to terminate the medical bosrd proceedings and be released from active duty, but only that appellee wanted to be granted a period of TAD to go to New York, pending completion of the medical board proceedings.

The trial judge in dismissing the charges for lack of personal jurisdiction did not make specific findings of fact in regard to whether the appellee actually requested release from active duty either before or after the expiration of his EAOS, and if so, when such requests were made. Instead, he noted the government's failure to follow the procedures prescribed by the Navy Military Personnel Manual for extending persons beyond their EAOS under the circumstances for the case **[*7]** *sub judice,* and further noted the appellee's desire to return to New York and his confusion in regard to his right to be released from active duty. Such factors led the trial judge to conclude that the government did not carry its burden in proving the appellee did not "in essence" object to further retention or that the government acted in response thereto, thereby resulting in the loss of court-martial jurisdiction over the appellee on 4 January 1985.

I

In concluding that the government did not sustain its burden in proving the court-martial had personal jurisdiction over the appellee, the trial judge approached the issue not from the viewpoint of whether the appellee actually served notice on the command of his objection to being retained past his EAOS, but whether the appellee was confused in regard to his right to be released from active duty and whether the appellee would have requested release had he been properly advised by military authorities. We believe the trial judge erroneously anchored his decision in the government's failure to disprove the appellee's constructive objection vice actual objection, that is, a constructive objection premises upon what the **[*8]** appellee would have done had he been properly advised rather than whether the appellee actuall objected to his continued retention on active duty. The basis for the trial judge's decision did not require a further finding of fact in regard to whether the appellee actually requested release from active

duty, and if so, when such request was made.

For purposes of construing the "awaiting discharge" clause of Article 2(a)(1), Uniform Code of Military Justice, the Court in *United States v. Douse, 12 M.J. 473, 475 (C.M.A. 1982)*, held that "a person subject to the Code continues in service until the formalities of discharge or release from active duty have been met or he *objects to his continued retention and a reasonable time expires without appropriate action by the Government*" (emphasis added). The Court concluded that an accused cannot "walk away on the date of expiration of enlistment, saying his status has ended and he is no longer in the service," and an accused's objection requires the government to discharge the accused or take reasonable action with a view toward trial in respect to "an offense committed before the expiration of the term of enlistment or one committed **[*9]** after the date but within the reasonable time period." *See United States v. Douse, 12 M.J. at 477, 478*.

In remanding the record to the trial judge for reconsideration, we require the application of the principle of actual notice to the holding of *United States v. Douse* in determining whether the government retained personal jurisdiction over the appellee. Assuming the trial judge determines that actual notice was served on the government by appellee for his release from active duty, the trial judge must further determine whether the government acted within a reasonable period of time upon receipt of such notice in taking action with a view toward prosecuting the offenses which were the subject of the appellee's court-martial. Neither the appellee's confusion in regard to his right to be released from active duty nor a determination that appellee probably would have elected to be released had he been properly advised by military officials defeats military jurisdiction under Article 2(a)(1), UCMJ, where the government has acted in good faith, albeit negligently, in retaining appellee on active duty beyond the expiration of his EAOS in contravention of the provisions of **[*10]** the Navy Military Personnel Manual. Consideration of such matters would circumvent the intent of Article 2(a)(1) of the Code to continue jurisdiction absent notice or evidence that the government failed to take appropriate action with a view toward prosecution within a reasonable time upon receipt of actual notice. The application of constructive notice to such considerations would treat appellee's enlistment as a contractual obligation to be construed in accordance with contractual principles rather than a status which continues beyond the expiration of the appellee's enlistment consistent with the teachings of *United States v. Douse, supra.*

Accordingly, we reverse the decision of the trial judge and remand the record to the Judge Advocate General of the Navy for further proceedings consistent with the requirements prescribed herein.

Senior Judge KERCHEVAL and Judge RAPP concur.

United States v. Crump

United States Air Force Court of Criminal Appeals

November 10, 2020, Decided

No. ACM 39628

Reporter
2020 CCA LEXIS 405 *; 2020 WL 6817741

UNITED STATES, Appellee v. Malik K. CRUMP, Airman (E-2), U.S. Air Force, Appellant

Notice: NOT FOR PUBLICATION

Subsequent History: Petition for review filed by *U. S. v. Crump, 2021 CAAF LEXIS 121 (C.A.A.F., Jan. 6, 2021)*

Motion granted by *United States v. Crump, 2021 CAAF LEXIS 4 (C.A.A.F., Jan. 7, 2021)*

Review denied by *United States v. Crump, 2021 CAAF LEXIS 270 (C.A.A.F., Mar. 25, 2021)*

Prior History: Appeal from the United States Air Force Trial Judiciary. Military Judge: Jefferson B. Brown (motions); Matthew D. Talcott. Approved sentence: Dishonorable discharge, confinement for 10 years, forfeiture of all pay and allowances, reduction to E-1, and a reprimand. Sentence adjudged 23 September 2018 by GCM convened at Joint Base San Antonio-Lackland, Texas.[1] **[*1]** .

Case Summary

Overview

HOLDINGS: [1]-Defendant airman was properly convicted of abusive sexual contact and assault and battery in violation of *10 U.S.C.S. §§ 920*, *928* because there was sufficient evidence he did not obtain consent from his victims, making his claim of consent unreasonable; [2]-The military judge properly denied defendant's motion of judicial recusal, R.C.M. 902, Manual Courts-Martial because, inter alia, defendant failed to overcome the presumption that a military judge is impartial and a reasonable person would not conclude impartiality could be questioned here; [3]-Evidence of uncharged sexual assaults were properly admitted, Mil. R. Evid. 413 and 403, because the military judge could reasonably find logical relevance in evidence that defendant sexually assaulted and attempted to sexually assault the other witnesses, and the military judge's ruling balanced the probative value of the witness's testimony against any countervailing interests.

Outcome

Approved findings and sentence affirmed, as modified.

LexisNexis® Headnotes

Military & Veterans Law > Military Offenses > General Article > Adultery, Bigamy & Related Crimes

Military & Veterans Law > Military Offenses > Categories of Offenses > Prejudicial to Discipline & Good Order

Military & Veterans Law > Military Offenses > Categories of Offenses > Service Discrediting Conduct

Military & Veterans Law > ... > Courts Martial > Sentences > Maximum Limits

Military & Veterans Law > ... > Courts Martial > Sentences > Confinement

HN1[] **General Article, Adultery, Bigamy & Related Crimes**

Adultery is a violation of Unif. Code Mil. Justice art. 134,

[1] We use the arraignment and trial location as reflected in the authenticated record of trial. The court-martial order (CMO) states, contrary to the authenticated transcript, that arraignment occurred at Joint Base San Antonio-Fort Sam Houston, Texas. In our decretal paragraph, we order a correction to the CMO for an error in the trial court's findings but we do not order a modification to the arraignment location.

10 U.S.C.S. § 934. The elements include (1) wrongful sexual intercourse; (2) when the military member or the other person was married; and (3) under the circumstances, the conduct is either prejudicial to good order and discipline or of a nature to bring discredit upon the armed forces. R.C.M. pt. IV, ¶ 62.b, Manual Courts-Martial. A court-martial conviction for adultery carries a maximum confinement term of one year. R.C.M. pt. IV, ¶ 62.e, Manual Courts-Martial.

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

Military & Veterans Law > ... > Courts Martial > Evidence > Weight & Sufficiency of Evidence

HN2[] Judicial Review, Standards of Review

The appellate court will review issues of legal and factual sufficiency de novo. The court's assessment of legal and factual sufficiency is limited to the evidence produced at trial.

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Burdens of Proof

Military & Veterans Law > ... > Courts Martial > Evidence > Weight & Sufficiency of Evidence

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN3[] Trial Procedures, Burdens of Proof

The test for legal sufficiency of the evidence is whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt. In resolving questions of legal sufficiency, the appellate court is bound to draw every reasonable inference from the evidence of record in favor of the prosecution. The term reasonable doubt, however, does not mean that the evidence must be free from conflict.

Military & Veterans Law > ... > Courts Martial > Evidence > Weight & Sufficiency of Evidence

HN4[] Evidence, Weight & Sufficiency of Evidence

The test for factual sufficiency is whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, we are convinced of the appellant's guilt beyond a reasonable doubt. In conducting this unique appellate role, the appellate court will take a fresh, impartial look at the evidence, applying neither a presumption of innocence nor a presumption of guilt to make our its independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt.

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Burdens of Proof

Military & Veterans Law > Military Offenses > Rape & Sexual Assault

Military & Veterans Law > Military Offenses > Sodomy

HN5[] Trial Procedures, Burdens of Proof

For the abusive sexual contact, a violation of Unif. Code Mil. Justice art. 120, the Government had to prove beyond a reasonable doubt: (1) the defendant committed sexual contact upon the victim by touching as set out; (2) the defendant did so by causing bodily harm to her; and (3) the defendant did so with intent to gratify his sexual desire. R.C.M. pt. IV, ¶ 45.b.(8)(b), Manual Courts-Martial. In this context, the term "sexual contact" means any touching either directly or through the clothing, of any body part of any person, if done with an intent to arouse or gratify the sexual desire of any person. R.C.M. pt. IV, ¶ 45.a.(g)(2)(B), Manual Courts-Martial. Bodily harm means any offensive touching of another, however slight, including any nonconsensual sexual act or nonconsensual sexual contact. R.C.M. pt. IV, ¶ 45.a.(g)(3), Manual Courts-Martial. Consent means a freely given agreement to the conduct at issue by a competent person. R.C.M. pt. IV, ¶ 45.a.(g)(8)(a), Manual Courts-Martial. An expression of lack of consent through words or conduct means there is no consent.

Military & Veterans Law > Military Offenses > Assault

HN6[] Military Offenses, Assault

Bodily harm means any offensive touching of another, however slight. R.C.M. pt. IV, ¶ 54.c.(1)(a), Manual Courts-Martial.

Military & Veterans Law > Military Offenses > Rape & Sexual Assault

HN7 **Military Offenses, Rape & Sexual Assault**

Sexual act includes either (1) contact between the penis and vulva where contact involving the penis occurs upon penetration, however slight; or (2) the penetration, however slight, of the vulva of another by any part of the body with an intent to arouse or gratify the sexual desire of any person. R.C.M. pt. IV, ¶ 45.a.(g)(1), Manual Courts-Martial.

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Burdens of Proof

HN8 **Trial Procedures, Burdens of Proof**

As the United States Court of Appeals for the Armed Forces (CAAF) has said, the burden is on the actor to obtain consent, rather than the victim to manifest a lack of consent.

Military & Veterans Law > ... > Courts Martial > Judges > Challenges to Judges

Military & Veterans Law > ... > Courts Martial > Evidence > Evidentiary Rulings

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Judicial Discretion

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN9 **Judges, Challenges to Judges**

The appellate court will review a military judge's decision not to recuse himself for an abuse of discretion. A military judge abuses his discretion when: (1) the findings of fact upon which he predicates his ruling are not supported by the evidence of record; (2) if incorrect legal principles were used; or (3) if his application of the correct legal principles to the facts is clearly unreasonable. The abuse of discretion standard is a strict one, calling for more than a mere difference of opinion. The challenged action must be arbitrary, fanciful, clearly unreasonable, or clearly erroneous.

Military & Veterans Law > ... > Courts Martial > Judges > Challenges to Judges

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Judicial Discretion

Military & Veterans Law > Military Justice > Courts Martial > Court-Martial Member Panel

Military & Veterans Law > ... > Courts Martial > Motions > Motions for Mistrial

HN10 **Judges, Challenges to Judges**

An accused has a constitutional right to an impartial judge. R.C.M. 902, Manual Courts-Martial governs disqualification of the military judge. R.C.M. 902(b) sets forth five specific circumstances in which a military judge shall disqualify himself or herself. The first specific circumstance, in R.C.M. 902(b)(1), requires disqualification where the military judge has a personal bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceeding. R.C.M. 902(b)(1) applies the same substantive standard as its civilian counterpart, 28 U.S.C.S. § 455. Any interest or bias to be disqualifying must be personal, not judicial, in nature.

Military & Veterans Law > ... > Courts Martial > Judges > Challenges to Judges

HN11 **Judges, Challenges to Judges**

R.C.M. 902(a), Manual Courts-Martial requires disqualification in any proceeding in which that military judge's impartiality might reasonably be questioned. Disqualification pursuant to R.C.M. 902(a) is determined by applying an objective standard of whether a reasonable person knowing all the circumstances would conclude that the military judge's impartiality might reasonably be questioned.

Military & Veterans Law > ... > Courts Martial > Judges > Challenges to Judges

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Judicial Discretion

HN12[] **Judges, Challenges to Judges**

There is a strong presumption that a judge is impartial, and a party seeking to demonstrate bias must overcome a high hurdle particularly when the alleged bias involves actions taken in conjunction with judicial proceedings. A military judge should not leave a case unnecessarily. R.C.M. 902(d)(1), Manual Courts-Martial. Of course, a judge has as much obligation not to disqualify himself when there is no reason to do so as he does to disqualify himself when the converse is true.

Criminal Law & Procedure > Preliminary Proceedings > Pretrial Motions & Procedures > Disqualification & Recusal

Military & Veterans Law > ... > Courts Martial > Judges > Challenges to Judges

Military & Veterans Law > ... > Trial Procedures > Pleas > Providence Inquiries

HN13[] **Pretrial Motions & Procedures, Disqualification & Recusal**

There is no per se rule that military judges are disqualified whenever, after accepting guilty pleas, they must later reject those pleas based on unforeseen circumstances. Even more so, there is no invariable requirement that judges sua sponte recuse themselves in all such cases. Even though a judge is not per se disqualified from presiding over a bench trial after rejecting guilty pleas, the facts of a particular case may still require recusal of the military judge, especially if the judge has formed an intractable opinion as to the guilt of the accused. A military judge's statements on the record may make clear that he had no intractable opinion regarding guilt or sentence.

Military & Veterans Law > ... > Courts Martial > Judges > Challenges to Judges

Military & Veterans Law > ... > Courts Martial > Sentences > Deliberations, Instructions & Voting

Military & Veterans Law > Military Justice > Disclosure & Discovery > Disclosure by Government

Military & Veterans Law > Military Justice > Courts Martial > Court-Martial Member Panel

Military & Veterans Law > Military Justice > Disclosure & Discovery > Discovery by Defense

HN14[] **Judges, Challenges to Judges**

Where the military judge makes full disclosure on the record and affirmatively disclaims any impact on him, where the defense has full opportunity to voir dire the military judge and to present evidence on the question, and where such record demonstrates that an appellant obviously was not prejudiced by the military judge's not recusing himself, the concerns of R.C.M. 902(a), Manual Courts-Martial are fully met.

Military & Veterans Law > ... > Courts Martial > Judges > Challenges to Judges

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Judicial Discretion

HN15[] **Judges, Challenges to Judges**

In the context of recusal, receiving a filing from a party does not give a military judge personal knowledge of the facts, disputed or otherwise, in a case. Rather, a military judge who receives a motion response is simply performing judicial duties. Exposure to what the parties are asserting are the facts does not impute "personal" knowledge to the military judge of disputed facts. Interest or bias is only disqualifying when it is personal, not judicial, in nature.

Criminal Law & Procedure > Preliminary Proceedings > Pretrial Motions & Procedures > Disqualification & Recusal

Military & Veterans Law > ... > Trial Procedures > Pleas > Providence Inquiries

HN16[] **Pretrial Motions & Procedures, Disqualification & Recusal**

The facts of a particular case may still require recusal of

the military judge after a guilty plea is withdrawn, especially if the judge has formed an intractable opinion as to the guilt of the accused. Here, the military judge had no intractable opinion regarding guilt.

Criminal Law & Procedure > ... > Standards of Review > Abuse of Discretion > Evidence

Military & Veterans Law > ... > Courts Martial > Evidence > Evidentiary Rulings

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Judicial Discretion

HN17[] **Abuse of Discretion, Evidence**

A military judge's decision to admit evidence is reviewed for an abuse of discretion.

Military & Veterans Law > Military Offenses > Assault

Military & Veterans Law > ... > Evidence > Admissibility of Evidence > Sex Offenses

Military & Veterans Law > Military Offenses > Rape & Sexual Assault

Military & Veterans Law > Military Offenses > Attempts

HN18[] **Military Offenses, Assault**

Mil. R. Evid. 413(a), Manual Courts-Martial provides that in a court-martial proceeding for a sexual offense, the military judge may admit evidence that the accused committed any other sexual offense. The evidence may be considered on any matter to which it is relevant. This includes using evidence of either a prior sexual assault conviction or uncharged sexual assaults to prove that an accused has a propensity to commit sexual assault. For purposes of Mil. R. Evid. 413, sexual offense means an offense punishable under the Unif. Code Mil. Justice or a crime under federal or state law involving inter alia conduct prohibited by Unif. Code Mil. Justice art. 120; conduct prohibited by 18 U.S.C.S. § 109A; contact, without consent, between the accused's genitals and any part of another person's body; or an attempt to engage in the conduct described above. Mil. R. Evid. 413(d)(1), (2), (4), (6).

Military & Veterans Law > ... > Evidence > Relevance > Confusion, Prejudice & Waste of Time

Military & Veterans Law > ... > Evidence > Admissibility of Evidence > Sex Offenses

Military & Veterans Law > ... > Courts Martial > Evidence > Preliminary Questions

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Findings

HN19[] **Relevance, Confusion, Prejudice & Waste of Time**

Military judges are required to make three threshold findings before admitting evidence under Mil. R. Evid. 413, Manual Courts-Martial: (1) the accused is charged with an offense of sexual assault; (2) the evidence proffered is evidence of his commission of another offense of sexual assault; and (3) the evidence is relevant under Mil. R. Evid. 401, Manual Courts-Martial and Mil. R. Evid. 402, Manual Courts-Martial. Additionally, the military judge must apply the balancing test of Mil. R. Evid. 403, Manual Courts-Martial to determine whether the probative value of the proffered evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or other countervailing considerations.

Military & Veterans Law > ... > Evidence > Admissibility of Evidence > Character, Custom & Habit Evidence

Military & Veterans Law > ... > Evidence > Admissibility of Evidence > Sex Offenses

Military & Veterans Law > ... > Evidence > Relevance > Confusion, Prejudice & Waste of Time

HN20[] **Admissibility of Evidence, Character,**

Custom & Habit Evidence

A non-exclusive list of factors to be considered under Mil. R. Evid. 403, Manual Courts-Martial in the context of Mil. R. Evid. 413, Manual Courts-Martial evidence include: the strength of the proof of the prior act of sexual assault; the probative weight of the evidence; the potential for less prejudicial evidence; distraction of the factfinder; the time needed for proof of the prior conduct; the temporal proximity of the prior conduct to the charged offense(s); the frequency of the acts; the presence or absence of intervening circumstances between the prior acts and charged offenses; and the relationship between the parties involved. The importance of a careful balancing arises from the potential for undue prejudice that is inevitably present when dealing with propensity evidence. However, inherent in Mil. R. Evid. 413 is a general presumption in favor of admission.

Military & Veterans
Law > ... > Witnesses > Compulsory Attendance of Witnesses > Interrogation & Presentation

HN21[] **Compulsory Attendance of Witnesses, Interrogation & Presentation**

Relevant evidence is evidence that has any tendency to make the existence of any fact of consequence to determining the case more probable or less probable than it would be without the evidence. Mil. R. Evid. 401. Relevance is a low threshold.

Military & Veterans
Law > ... > Evidence > Admissibility of Evidence > Admissions & Confessions

Military & Veterans
Law > ... > Witnesses > Compulsory Attendance of Witnesses > Interrogation & Presentation

Military & Veterans
Law > ... > Evidence > Admissibility of Evidence > Real Evidence & Writings

HN22[] **Admissibility of Evidence, Admissions & Confessions**

In the context of confessions and admissions, corroborate means independent evidence that raises an inference of truth and would tend to establish the trustworthiness of a statement. Mil. R. Evid. 304(c)(1), (4), Manual Courts-Martial.

Military & Veterans
Law > ... > Evidence > Admissibility of Evidence > Admissions & Confessions

Military & Veterans
Law > ... > Evidence > Admissibility of Evidence > Sex Offenses

Military & Veterans
Law > ... > Evidence > Relevance > Confusion, Prejudice & Waste of Time

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Deliberations & Voting

Military & Veterans
Law > ... > Evidence > Admissibility of Evidence > Real Evidence & Writings

HN23[] **Admissibility of Evidence, Admissions & Confessions**

When considering the factors to be considered under Mil. R. Evid. 403, Manual Courts-Martial in the context of Mil. R. Evid. 413, Manual Courts-Martial, the strength of proof factor ranges from a high of conviction to a low of gossip.

Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion

HN24[] **Standards of Review, Abuse of Discretion**

But an abuse of discretion requires more than a mere difference of opinion.

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Appeal by United States

Military & Veterans Law > ... > Courts Martial > Sentences > Fines & Forfeitures

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

Military & Veterans Law > Military Justice > Apprehension & Restraint of Civilians & Military Personnel > Unlawful Restraint

Military & Veterans Law > ... > Courts Martial > Pretrial Proceedings > Investigations

HN25 **Trial Procedures, Appeal by United States**

The Courts of Criminal Appeals have discretion, in the exercise of their authority under Unif. Code Mil. Justice art. 66, *10 U.S.C.S. § 866*, to determine whether to apply waiver or forfeiture in a particular case, or to pierce waiver or forfeiture in order to correct a legal error.

Criminal Law & Procedure > ... > Standards of Review > Abuse of Discretion > Discovery

Military & Veterans Law > Military Justice > Disclosure & Discovery > Discovery Misconduct

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

Military & Veterans Law > ... > Courts Martial > Evidence > Evidentiary Rulings

HN26 **Abuse of Discretion, Discovery**

In reviewing discovery matters, the appellate court will conduct a two-step analysis: first, it will determine whether the information or evidence at issue was subject to disclosure or discovery; second, if there was nondisclosure of such information, the appellate court will test the effect of that nondisclosure on the defendant's trial. The appellate court will review a military judge's decision on a request for discovery for an abuse of discretion.

Military & Veterans Law > Military Justice > Disclosure & Discovery > Disclosure by Government

Military & Veterans Law > Military Justice > Disclosure & Discovery > Discovery by Defense

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Judge Advocate Review

HN27 **Disclosure & Discovery, Disclosure by Government**

The suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. The United States Supreme Court has extended Brady, clarifying that the duty to disclose such evidence is applicable even though there has been no request by the accused and includes impeachment evidence as well as exculpatory evidence. A military accused also has the right to obtain favorable evidence under Unif. Code Mil. Justice art. 46, *10 U.S.C.S. § 846* as implemented by R.C.M. 701-703, Manual Courts-Martial. Accordingly, Article 46, and these implementing rules provide a military accused statutory discovery rights that are greater than those afforded by the U.S. Constitution. In particular, R.C.M. 701(a)(2)(A) requires the Government, upon defense request, to permit the inspection of, inter alia, any documents within the possession, custody, or control of military authorities, and which are material to the preparation of the defense.

Criminal Law & Procedure > Counsel > Prosecutors

HN28 **Counsel, Prosecutors**

Trial counsel must exercise due diligence in discovering favorable evidence not only in his possession but also in the possession of other military authorities and make them available for inspection. The parameters of the review that must be undertaken outside the prosecutor's own files will depend in any particular case on the relationship of the other governmental entity to the prosecution and the nature of the defense discovery request. The scope of this due-diligence requirement generally is limited to (1) the files of law enforcement authorities that have participated in the investigation of the subject matter of the charged offenses; (2) investigative files in a related case maintained by an entity closely aligned with the prosecution; and (3) other files, as designated in a defense discovery request, that involved a specific type of information within a specified entity.

Military & Veterans Law > Military Justice > Disclosure & Discovery > Disclosure by Government

Military & Veterans Law > Military Justice > Disclosure & Discovery > Discovery by Defense

Military & Veterans Law > Military Justice > Apprehension & Restraint of Civilians & Military Personnel > Restrictions

HN29 **Disclosure & Discovery, Disclosure by Government**

Generally, an object held by a state law enforcement agency is ordinarily not in the possession, custody, or control of military authorities. However, a trial counsel cannot avoid R.C.M. 701(a)(2), Manual Courts-Martial through the simple expedient of leaving relevant evidence to repose in the hands of another agency while utilizing his access to it in preparing his case for trial.

Military & Veterans Law > Military Justice > Disclosure & Discovery > Disclosure by Government

Military & Veterans Law > Military Justice > Disclosure & Discovery > Discovery by Defense

Military & Veterans Law > ... > Witnesses > Compulsory Attendance of Witnesses > Interrogation & Presentation

HN30 **Disclosure & Discovery, Disclosure by Government**

The e Court of Appeals for the Armed Forces has identified a number of scenarios from U.S. Const. art. III courts where evidence not in the physical possession of the prosecution team is still within the possession, custody, or control of military authorities. These include when: (1) the prosecution has both knowledge and access to the object; (2) the prosecution has the legal right to obtain the evidence; (3) the evidence resides in another agency but was part of a joint investigation; and (4) the prosecution inherits a case from a local sheriff's office and the object remains in the possession of the local law enforcement. Additionally, pursuant to the provisions of R.C.M. 701(a)(6), Manual Courts-Martial, a trial counsel cannot avoid discovery obligations by remaining willfully ignorant of evidence that reasonably tends to be exculpatory, even if that evidence is in the hands of a Government witness.

Military & Veterans Law > Military Justice > Disclosure & Discovery > Disclosure by Government

HN31 **Disclosure & Discovery, Disclosure by Government**

Where the defense specifically requests discoverable information that is erroneously withheld, the error is tested for harmlessness beyond a reasonable doubt. Failing to disclose requested material favorable to the defense is not harmless beyond a reasonable doubt if the undisclosed evidence might have affected the outcome of the trial. Inadvertent nondisclosure has the same impact on the fairness of the proceedings as deliberate concealment. However, mere speculation that some exculpatory material may have been withheld is unlikely to establish good cause for a discovery request on collateral review, nor should such suspicion suffice to impose a duty on defense counsel to advance a claim for which they have no evidentiary support.

Military & Veterans Law > ... > Evidence > Relevance > Confusion, Prejudice & Waste of Time

Military & Veterans Law > ... > Courts Martial > Evidence > Preliminary Questions

Military & Veterans Law > ... > Courts Martial > Sentences > Deliberations, Instructions & Voting

Military & Veterans Law > Military Justice > Disclosure & Discovery > Discovery by Defense

Military & Veterans Law > Military Justice > Disclosure & Discovery > Disclosure by Government

HN32 **Relevance, Confusion, Prejudice & Waste of Time**

R.C.M. 703, Manual Courts-Martial provides each party

is entitled to the production of evidence which is relevant and necessary. R.C.M. 703(f)(1); Evidence is relevant if it has any tendency to make a fact more or less probable than it would be without the evidence and is of consequence in determining the action. Mil. R. Evid. 401, Manual Courts-Martial. Relevant evidence is necessary when it is not cumulative and when it would contribute to a party's presentation of the case in some positive way on a matter in issue. R.C.M. 703(f)(1). The moving party is required, as a threshold matter, to show the requested material existed.

Military & Veterans Law > Military Justice > Disclosure & Discovery > Disclosure by Government

Military & Veterans Law > Military Justice > Disclosure & Discovery > Discovery by Defense

Military & Veterans Law > ... > Courts Martial > Motions > Procedures

Military & Veterans Law > ... > Witnesses > Compulsory Attendance of Witnesses > Interrogation & Presentation

Military & Veterans Law > ... > Courts Martial > Pretrial Proceedings > Investigations

HN33[] **Disclosure & Discovery, Disclosure by Government**

In addition to production of evidence, counsel for the accused shall have an equal opportunity to obtain witnesses in accordance with such regulations as the President may prescribe. Unif. Code Mil. Justice art. 46, *10 U.S.C.S. § 846*. The defense shall submit to the trial counsel a written list of witnesses whose production by the Government the defense requests. R.C.M. 703(c)(1), Manual Courts-Martial. A list of witnesses whose testimony the defense considers relevant and necessary on the merits or on an interlocutory question shall include the name, telephone number, if known, and address or location and a synopsis of the expected testimony sufficient to show its relevance and necessity. R.C.M. 703(c)(2)(B). The military judge may set a specific date by which such lists must be submitted. R.C.M. 703(c)(2)(C). Failure to submit the name of a witness in a timely manner shall permit denial of a motion for production of the witness, but relief from such denial may be granted for good cause shown.

Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion

Military & Veterans Law > ... > Courts Martial > Evidence > Evidentiary Rulings

Military & Veterans Law > ... > Witnesses > Compulsory Attendance of Witnesses > Interrogation & Presentation

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

Criminal Law & Procedure > ... > Standards of Review > Abuse of Discretion > Witnesses

HN34[] **Standards of Review, Abuse of Discretion**

A military judge's ruling on a request for a witness is reviewed for an abuse of discretion. The appellate court will not set aside a judicial denial of a witness request unless we have a definite and firm conviction that the trial court committed a clear error of judgment in the conclusion it reached upon a weighing of relevant factors. Factors to be weighed to determine whether personal production of a witness is necessary include: the issues involved in the case and the importance of the requested witness to those issues; whether the witness is desired on the merits; whether the witness's testimony would be merely cumulative; and the availability of alternatives to the personal appearance of the witness. Timeliness of the request may also be a consideration when determining whether production of a witness is necessary.

Military & Veterans Law > Military Justice > Disclosure & Discovery > Disclosure by Government

Military & Veterans Law > Military Justice > Disclosure & Discovery > Discovery by Defense

Military & Veterans Law > Military Justice > Apprehension & Restraint of Civilians & Military Personnel > Restrictions

HN35[] **Disclosure & Discovery, Disclosure by Government**

The court recognizes that an object held by a state law enforcement agency is ordinarily not in the possession, custody, or control of military authorities but a trial counsel cannot avoid R.C.M. 701(a)(2), Manual Courts-Martial through the simple expedient of leaving relevant evidence to repose in the hands of another agency while utilizing his access to it in preparing for trial.

HN36[] The court will not presume or guess that evidence is exculpatory.

Military & Veterans Law > Military Justice > Disclosure & Discovery > Disclosure by Government

Military & Veterans Law > ... > Courts Martial > Sentences > Maximum Limits

Military & Veterans Law > ... > Courts Martial > Sentences > Presentencing Proceedings

HN37[] **Disclosure & Discovery, Disclosure by Government**

R.C.M. 701(a)(6), Manual Courts-Martial, addresses favorable evidence that would negate or reduce the degree of guilt to a charged offense or reduce the punishment.

Criminal Law & Procedure > ... > Discovery & Inspection > Brady Materials > Brady Claims

Criminal Law & Procedure > Appeals > Reversible Error > Discovery

HN38[] **Brady Materials, Brady Claims**

Generally, the production of Brady evidence is required and reversal mandated where, after trial, such information is discovered which was known to the prosecution but which was unknown to the defense.

Military & Veterans Law > ... > Evidence > Admissibility of Evidence > Admissions & Confessions

Military & Veterans Law > ... > Courts Martial > Evidence > Evidentiary Rulings

Military & Veterans Law > ... > Evidence > Admissibility of Evidence > Sex Offenses

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

Military & Veterans Law > ... > Courts Martial > Evidence > Preliminary Questions

HN39[] **Admissibility of Evidence, Admissions & Confessions**

The appellate court will review a military judge's decision to admit or exclude evidence for an abuse of discretion. The application of Mil. R. Evid. 412, Manual Courts-Martial, to proffered evidence is a legal issue that appellate courts review de novo.

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Burdens of Proof

Military & Veterans Law > ... > Evidence > Admissibility of Evidence > Sex Offenses

HN40[] **Trial Procedures, Burdens of Proof**

Mil. R. Evid. 412, Manual Courts-Martial, provides that, in any proceeding involving an alleged sexual offense, evidence offered to prove the alleged victim engaged in other sexual behavior or has a sexual predisposition is generally inadmissible, with three limited exceptions, the third of which is pertinent to this case. The burden is on the defense to overcome the general rule of exclusion by demonstrating an exception applies.

Military & Veterans Law > ... > Evidence > Relevance > Confusion, Prejudice & Waste of Time

Military & Veterans Law > ... > Evidence > Admissibility of Evidence > Sex Offenses

Military & Veterans Law > ... > Evidence > Admissibility of Evidence > Real Evidence & Writings

HN41 **Relevance, Confusion, Prejudice & Waste of Time**

The third exception under Mil. R. Evid. 412, Manual Courts-Martial, provides that the evidence is admissible if its exclusion would violate the constitutional rights of the accused. Mil. R. Evid. 412(b)(1)(C). Generally, evidence of other sexual behavior by an alleged victim must be admitted within the ambit of Mil. R. Evid. 412(b)(1)(C) when it is relevant, material, and the probative value of the evidence outweighs the dangers of unfair prejudice.

Military & Veterans Law > ... > Courts Martial > Evidence > Preliminary Questions

HN42 **Evidence, Preliminary Questions**

Relevance is a low threshold. Evidence is relevant if it has any tendency to make the existence of a fact more probable or less probable than it would be without the evidence. Mil. R. Evid. 401(a), Manual Courts-Martial.

HN43 Materiality is a multi-factored test looking at the importance of the issue for which the evidence was offered in relation to the other issues in the case; the extent to which the issue is in dispute; and the nature of the evidence.

Military & Veterans Law > ... > Evidence > Relevance > Confusion, Prejudice & Waste of Time

Military & Veterans Law > ... > Evidence > Admissibility of Evidence > Sex Offenses

Military & Veterans Law > ... > Evidence > Admissibility of Evidence > Real Evidence & Writings

Military & Veterans Law > ... > Evidence > Privileged Communications > Self-Incrimination Privilege

HN44 **Relevance, Confusion, Prejudice & Waste of Time**

Even if the evidence is relevant and material, it must be admitted only when the defendant can show that the probative value outweighs the dangers of unfair prejudice. Mil. R. Evid. 412(c)(3), Manual Courts-Martial. Those dangers include inter alia harassment or interrogation that is repetitive or only marginally relevant.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Assistance of Counsel

Criminal Law & Procedure > ... > Defendant's Rights > Right to Counsel > Effective Assistance of Counsel

Criminal Law & Procedure > ... > Standards of Review > De Novo Review > Ineffective Assistance of Counsel

HN45 **Criminal Process, Assistance of Counsel**

The *Sixth Amendment* guarantees an accused the right to effective assistance of counsel. In assessing the effectiveness of counsel, the appellate court will apply the standard set forth in and begin with the presumption of competence. The appellate court review allegations of ineffective assistance de novo.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Assistance of Counsel

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Trials

HN46 **Criminal Process, Assistance of Counsel**

The appellate court will utilize the following three-part test to determine whether the presumption of competence has been overcome: 1. Are appellant's allegations true; if so, is there a reasonable explanation for counsel's actions? 2. If the allegations are true, did defense counsel's level of advocacy fall measurably below the performance ordinarily expected of fallible lawyers? 3. If defense counsel was ineffective, is there a reasonable probability that, absent the errors, there would have been a different result? The burden is on the appellant to demonstrate both deficient performance

and prejudice.

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Trials

HN47[] Effective Assistance of Counsel, Tests for Ineffective Assistance of Counsel

Defense counsel do not perform deficiently when they make a strategic decision to accept a risk or forego a potential benefit, where it is objectively reasonable to do so. In reviewing the decisions and actions of trial defense counsel, the appellate court does not second-guess strategic or tactical decisions. It is only in those limited circumstances where a purported strategic or deliberate decision is unreasonable or based on inadequate investigation that it can provide the foundation for a finding of ineffective assistance.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Assistance of Counsel

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Trials

HN48[] Criminal Process, Assistance of Counsel

Courts evaluate trial defense counsel's performance not by the success of their strategy, but rather whether counsel made objectively reasonable choices in strategy from the alternatives available at the trial.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Criminal Law & Procedure > ... > Standards of Review > De Novo Review > Speedy Trial

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Actions by Convening Authority

Military & Veterans Law > Military Justice > Apprehension & Restraint of Civilians & Military Personnel > Speedy Trial

HN49[] Procedural Due Process, Scope of Protection

The appellate court will review de novo claims that an appellant has been denied the due process right to a speedy post-trial review and appeal. There is a presumption of facially unreasonable delay when a Court of Criminal Appeals does not render a decision within 18 months of docketing. Where there is such a delay, the higher court will examine the four factors set forth in: (1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of his right to a timely review; and (4) prejudice to the appellant. No single factor is required for finding a due process violation and the absence of a given factor will not prevent such a finding.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Military & Veterans Law > Military Justice > Apprehension & Restraint of Civilians & Military Personnel > Speedy Trial

HN50[] Procedural Due Process, Scope of Protection

Where an appellant has not shown prejudice from the delay, there is no due process violation unless the delay is so egregious as to adversely affect the public's perception of the fairness and integrity of the military justice system. There are three identified types of cognizable prejudice for purposes of an appellant's due process right to timely post-trial review: (1) oppressive incarceration; (2) anxiety and concern; and (3) impairment of the appellant's ability to present a defense at a rehearing.

Military & Veterans Law > Military Justice > Apprehension & Restraint of Civilians & Military Personnel > Speedy Trial

HN51[] Apprehension & Restraint of Civilians &

Military Personnel, Speedy Trial

In the context of appellate court delay, the appropriate test for the military justice system is to require an appellant to show particularized anxiety or concern that is distinguishable from the normal anxiety experienced by prisoners awaiting an appellate decision.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Military & Veterans Law > Military Justice > Apprehension & Restraint of Civilians & Military Personnel > Speedy Trial

HN52[] **Procedural Due Process, Scope of Protection**

Where there is no qualifying prejudice from the delay, there is no due process violation unless the delay is so egregious as to adversely affect the public's perception of the fairness and integrity of the military justice system.

Counsel: For Appellant: Captain Amanda E. Dermady, USAF; Mark C. Bruegger, Esquire.

For Appellee: Lieutenant Colonel Joseph J. Kubler, USAF; Lieutenant Colonel Brian C. Mason, USAF; Major Jessica L. Delaney, USAF; Major Anne M. Delmare, USAF; Mary Ellen Payne, Esquire.

Judges: Before J. JOHNSON, LEWIS, and POSCH, Appellate Military Judges. Senior Judge LEWIS delivered the opinion of the court, in which Chief Judge J. JOHNSON and Senior Judge POSCH joined.

Opinion by: LEWIS

Opinion

LEWIS, Senior Judge:

A general court-martial composed of a military judge sitting alone convicted Appellant, contrary to his pleas, of three specifications of sexual assault and one specification of abusive sexual contact in violation of *Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920*,[2],[3] and one specification of assault consummated by a battery in violation of *Article 128, UCMJ, 10 U.S.C. § 928*.[4] The court-martial **[*2]** sentenced Appellant to a dishonorable discharge, confinement for ten years, forfeiture of all pay and allowances, reduction to the grade of E-1, and a reprimand. The convening authority approved the adjudged sentence but failed to include the reprimand of Appellant in the action as required by Rule for Courts-Martial (R.C.M.) 1107(f)(4)(G). *See also* R.C.M. 1003(b)(1). We take corrective action to remedy this error and do not approve the reprimand in our decretal paragraph.

Appellant raised 12 issues[5] for our consideration: (1) whether the evidence is legally and factually sufficient; (2) whether the military judge erred by not recusing himself; (3) whether the military judge erred by admitting testimony offered pursuant to Mil. R. Evid. 413; (4) whether the military judge erred by failing to compel the production of evidence and witnesses from the investigation of the Mil. R. Evid. 413 witness's claims; (5) whether the military judge erred in excluding evidence under Mil. R. Evid. 412; (6) whether Appellant was denied effective assistance of counsel under the

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[2] All references to the Uniform Code of Military Justice (UCMJ), Rules for Courts-Martial (R.C.M.), and Military Rules of Evidence are to the *Manual for Courts-Martial, United States* (2016 ed.) (*MCM*).

[3] The abusive sexual contact offense was charged as aggravated sexual contact, also a violation of *Article 120, UCMJ*. The military judge found Appellant guilty of the "lesser included offense" of abusive sexual contact. After the presentation of evidence, trial defense counsel agreed with the military judge that abusive sexual contact was a lesser included offense of aggravated sexual contact. Additionally, the finding of guilty to this specification was by exceptions and substitutions.

[4] Appellant initially pleaded guilty to assault consummated by a battery and the military judge found his plea provident and entered findings of guilty. This plea of guilty was later withdrawn. We describe the circumstances of that withdrawal when we assess Appellant's second assignment of error, whether the military judge erred by not recusing himself.

[5] We have reordered and reworded the assignments of error. Appellant personally raises issues (7), (8), (9), (10), and (11) pursuant to *United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982)*.

Sixth Amendment[6] as alleged in three deficiencies in the performance of his trial defense counsel; (7) whether Appellant was unlawfully deprived of a panel of his peers in violation of the Sixth Amendment and *Article 25, UCMJ, 10 U.S.C. § 825* **[*3]** ; (8) whether trial defense counsel were ineffective on additional grounds by declining to search Appellant's phone or review the Snapchat messages he exchanged with one victim; (9) whether the military judge erred by considering an unsworn victim impact statement under R.C.M. 1001A; (10) whether the mandatory dishonorable discharge is unconstitutional; (11) whether the sentence to ten years of confinement was unduly severe; and (12) whether the cumulative error doctrine requires relief. In addition, although not raised by Appellant, we consider whether he is entitled to relief for facially unreasonable appellate delay.

With respect to issues (7), (8), (9), and (11), we have carefully considered Appellant's contentions and find they do not require further discussion or warrant relief. *See* United States v. Matias, 25 M.J. 356, 361 (C.M.A. 1987).

Regarding issue (10), we find the assignment of error to be without merit for the reasons we announced in three prior cases: United States v. Rita, ___ M.J. ___, No. ACM 39614, 2020 CCA LEXIS 238, at *5-7 (A.F. Ct. Crim. App 17 Jul. 2020), *rev. denied*, *No. 20-0365, 80 M.J. 363, 2020 CAAF LEXIS 571 (C.A.A.F. 15 Oct. 2020)*; United States v. Plourde, No. ACM 39478, 2019 CCA LEXIS 488, at *45-49 (A.F. Ct. Crim. App. 6 Dec. 2019) (unpub. op.), *rev. denied*, *80 M.J. 73 (C.A.A.F. 2020)*; and United States v. Yates, No. ACM 39444, 2019 CCA LEXIS 391, at *71-73 (A.F. Ct. Crim. App. 30 Sep. 2019) (unpub. op.), *rev. denied*, *80 M.J. 80 (C.A.A.F. 2020)*.

On the remaining issues, we find no error that materially prejudiced **[*4]** Appellant's substantial rights. As assertions of error without merit are not sufficient to invoke the doctrine of cumulative error, we find no relief warranted for issue (12). *See* United States v. Gray, 51 M.J. 1, 61 (C.A.A.F. 1999). We affirm the findings and, except for the reprimand, the approved sentence.

I. Background

Appellant joined the Air Force in February 2017. After successfully completing basic military training, Appellant began technical training in a medical career field at Joint Base San-Antonio Fort Sam Houston, Texas. The charged offenses arose from two separate incidents in Appellant's dormitory room on that installation. The first incident occurred in July 2017 and the second in November 2017. Each incident involved a different female Airman who lived in the same dormitory as Appellant and had visited his room. The incident in July involved Airman (Amn) MM and the incident in November involved Airman Basic (AB) EA.[7] We address the two incidents in that order.

A. Airman MM

The military judge convicted Appellant of two offenses involving Amn MM: (1) abusive sexual contact, by causing bodily harm, when Appellant touched her hips through her clothing with an intent to gratify his sexual desire; and (2) assault consummated **[*5]** by a battery when he unlawfully struck her in the face with his hand. Both offenses occurred during the same visit to Appellant's room. Before describing the offenses, we address the prior interactions of Appellant and Amn MM before the day of the offenses.

1. Prior Interactions

Amn MM first met Appellant in May 2017 while hanging out at the dormitory where both lived. Later, Amn MM saw Appellant off-base when both were getting tattoos. At this point, the two exchanged phone numbers and then started texting each other and communicating over the social media application Snapchat. At first, the two were only friends, but over time they had consensual sexual intercourse—sometimes in his dormitory room and sometimes in hers.

Evidence of Amn MM's and Appellant's consensual sexual activities before the charged conduct was admitted, pursuant to Mil. R. Evid. 412, to show whether Appellant had a mistake of fact defense to the offenses. While there was general agreement that the prior sexual encounters occurred, Appellant and Amn MM disagreed on the specifics. Most notably, they disagreed about whether Appellant had been allowed to slap Amn MM on her face or on her buttocks during sexual intercourse.

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[6] U.S. CONST. amend. VI.

[7] This opinion uses their grades as listed on the charge sheet. Both had been promoted by the time of their trial testimony.

Amn MM recalled **[*6]** Appellant weakly slapping her buttocks while they were having intercourse on two separate occasions. On the first occasion the slap was at her request. Afterwards, Amn MM joked with Appellant that he "hit like a bitch" because he hit her softly and the two laughed about it. Amn MM testified that Appellant slapped her buttocks one other time while they were having intercourse, even though she did not request it, but she was "okay" with him doing it.

Amn MM denied ever asking Appellant to hit her in the face during intercourse. Instead, she recalled a conversation with Appellant on this subject where he explained how an ex-girlfriend of his "loved for him to slap her in the face." Amn MM testified that her response to Appellant was "[w]ell that's all fine and dandy for her, but do not touch my face. I have personal issues with that; do not touch my face."

Appellant testified that he smacked Amn MM on the buttocks during intercourse but she had never asked him to do so. Instead, Appellant testified on a prior occasion Amn MM requested that he "smack her" while he was on top of her during sex and so he slapped her in the face "not very hard." According to Appellant, it was this slap that **[*7]** caused Amn MM to remark that he hit "like a bitch." Appellant denied having a prior conversation with Amn MM that her face was off-limits.

After the last time Amn MM and Appellant had consensual intercourse, Amn MM started a new relationship and subsequently told Appellant she did not want to have sex with him anymore. Appellant got upset and called Amn MM "a hoe." Amn MM stopped speaking with Appellant for almost two weeks. The charged offenses occurred when Appellant attempted to reconcile with Amn MM.

2. Abusive Sexual Contact and Battery of Amn MM

On 13 July 2017, Appellant messaged and texted Amn MM, asking for her to come to his room so he could apologize to her face-to-face for the name he called her. She agreed to visit his room but also messaged Appellant that she was not going to have sex with him. Upon entering Appellant's room, Amn MM noticed Appellant's roommate was not present. The door closed behind Amn MM after she entered.[8] Appellant, who was sitting on his bed, began apologizing. Amn MM replied "well, if that's all you have to say I'm leaving. I'm over it." At this point, Amn MM and Appellant have markedly different accounts about what happened next in Appellant's dormitory **[*8]** room. We begin with Amn MM's testimony and the evidence that supported her testimony.

a. Testimony of Amn MM and Supporting Evidence

After Amn MM told Appellant she was leaving, she recalled Appellant grabbing the front of her shirt and trying to pull her closer to where he was seated on the bed. She told him "no. Stop. Don't do that. Get off." Rather than stop, Appellant got up from the bed and tried to get behind Amn MM. She turned as he did and ended up with her back to his bed. With a hold of Amn MM's shirt, Appellant tried to push her backwards onto the bed multiple times. Each time, Amn MM resisted and stood back up two or three times after Appellant would push her onto the bed. During this struggle, Appellant let go of Amn MM's shirt and began trying to take off her leggings by grabbing the side of her waistband at her hip area. She kept a grip on her leggings and "was not going to let them come off."

As Amn MM resisted, Appellant said "I don't know why you're playing with me. You need to stop. . . . I told you I was sorry." Appellant flipped Amn MM over so she now faced the bed with one forearm down on it while she held up her leggings with her other hand. Appellant, now behind **[*9]** her, tried again to pull her leggings down with his hands at the side of her waistband. Amn MM pushed off the bed with her forearm and was able to get up, turn, and face Appellant. She then pushed Appellant with her right hand. In response, Appellant said either "[d]on't [f]'ing hit me" or "[d]on't [f]'ing push me" and then hit Amn MM, open handed, on the left side of her face. Amn MM felt immediate pain and told Appellant to get away from her. Appellant backed away and Amn MM left immediately to go a friend's room, Airman First Class (A1C) AP.

A1C AP was not in her room, but at the gym. A1C AP saw that she missed a call from Amn MM and then saw a text message that Amn MM really needed to speak with her. When the two met at A1C AP's room, A1C AP could see Amn MM was distraught and crying hard. A red mark on Amn MM's left cheek was visible to A1C AP. Amn MM cried so hard for the first few minutes that she could not talk, something that A1C AP had never seen from her close friend. Amn MM then disclosed how

[8] The record of trial contains a technical training student housing gender integration policy which required "[d]oors must remain fully open when a guest is inside."

Appellant had tried to get on top of her and touch her and when she pushed him off of her, he hit her in the face. Neither Amn MM nor A1C AP immediately reported Appellant to authorities. **[*10]**

When Amn MM went to school the next day, the place where Appellant hit her face showed bruising. Amn MM tried to cover it up with makeup, unsuccessfully. A prior service student noticed the injury and pulled Amn MM out of class and asked her what happened. In turn, instructors and investigators were notified. Photos of the bruising on Amn MM's face were taken two to three days after she was struck and later the following week. The photos were admitted into evidence.

b. Appellant's Pretrial Statements

On 20 September 2017, agents from the Air Force Office of Special Investigations (AFOSI) interviewed Appellant. After a proper waiver of his rights under *Article 31, UCMJ, 10 U.S.C. § 831*, Appellant made oral and written statements. On 29 September 2017, a second interview was conducted after another rights advisement. Appellant made further oral statements and completed a second written statement. At trial, Special Agent (SA) PA, who had spent 24 years as an AFOSI special agent, testified to Appellant's pretrial statements. Both written statements were admitted into evidence as prosecution exhibits and small portions of the recorded interviews were admitted into evidence.[9]

According to Appellant's **[*11]** first written statement, after he apologized to Amn MM for calling her a "hoe," she started to leave and he reached out for her hand and pulled her in. He stated they kissed and then rolled over on his bed to where he was on top. He then wrote the following:

> While kissing she moved her head away so I leaned in again to continue kissing. While kissing [Amn MM] mumbled something that I couldn't really hear. So noticing that kissing wasn't working to the point I needed I slapped her with my right hand onto her left cheek/eye.

Appellant's second written statement, clarified that when he was kissing Amn MM, she "pulled away." This was similar to an oral statement Appellant made that Amn MM had "started to squirm away a little bit." Appellant further clarified that he did not hit Amn MM because she mumbled something. He wrote, "[Amn MM] mumbled something I cannot remember. NOT in reaction to what she said I smacked her across the left side of her face."

In addition to these clarifications, Appellant provided a further written explanations for why he struck Amn MM:

> [j]ust to try and get her in the mood for sex. Knowing she liked it rough I tried to turn her on that way. Doing so was [completely] **[*12]** wrong. [There] were multiple signs I should [have] paid more attention to. I was caught in the heat of the moment, not realizing what was happening. I am in complete fault for my actions.
> . . .
> She moved away in a manner as if she wasn't interested and wanted to stop.

SA PA also testified to another inconsistency from Appellant's oral interview. First, Appellant told SA PA two different versions of how Amn MM reacted after he hit her. Initially, Appellant said Amn MM looked up at him almost in a "seductive" manner and they started kissing again. Subsequently, Appellant described Amn MM's reaction as "upset" or a "what are you doing[?]" look.

c. Appellant's Trial Testimony

Appellant described his apology to Amn MM and testified that it led to subsequent consensual kissing on the bed where he ended up on top of her. Appellant testified that Amn MM did not protest the kissing and laying down on the bed "at the moment." After further kissing, Appellant recalled "[s]he jerks her head—not really jerks, but moves her head to the right side, I believe." He testified they kissed again for a minute or two before "[s]he pulls away and then mumbled something." Appellant explained he took her mumbling **[*13]** "as, '[s]trike me,' so I hit her—I smack her across the face."

On cross-examination, Appellant admitted that Amn MM had texted him beforehand that she was not going to have sex with him and that he initially denied this fact to the AFOSI agents. Appellant testified he "never tried to pull down" Amn MM's pants. While on the bed, Appellant admitted that Amn MM squirmed but he claimed that when Amn MM moved her head away that

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[9] While three excerpts were admitted, only one is transcribed in accordance with Air Force Manual 51-203, *Records of Trial*, ¶ 12.8 (4 Sep. 2018) ("Transcribe verbatim audio or video recordings introduced at trial."). We find no prejudice to Appellant from the failure to transcribe two of the recorded interview excerpts.

was the same thing as her squirming away. He explained "[w]hen she moved her head, her whole body moved. It wasn't just a head in motion because it would be kind of hard to do while laying down." Appellant asserted "[s]exual gratification was not on my mind."

d. Trial Result

The military judge acquitted Appellant of aggravated sexual contact of Amn MM, but convicted him of abusive sexual contact by exceptions and substitutions. The military judge found that Appellant touched Amn MM's hips, rather than her legs, as was charged, through her clothing with an intent to gratify his sexual desire. The military judge convicted Appellant of assault consummated by a battery of Amn MM for unlawfully striking her face with his hand, as charged.

B. AB EA

The military judge convicted **[*14]** Appellant, as charged, of three specifications of sexually assaulting AB EA by penetrating her vulva with his finger, tongue, and penis, without her consent. The military judge merged the three specifications for sentencing as the offenses occurred in close succession on a single visit by AB EA to Appellant's dormitory room.

We explain the interactions between AB EA and Appellant before the charged conduct before detailing their starkly different trial testimonies about what happened in Appellant's dormitory room. While explaining their prior interactions, we describe the perspective of two witnesses: (1) Appellant's then girlfriend and later wife, A1C PC,[10] and (2) AB EA's roommate, Amn AG.

1. Prior Interactions

Appellant and AB EA met through mutual friends when she first arrived at technical training sometime after late July 2017. Subsequently, Appellant and AB EA shared the same "friend group" and often spent time together in a group setting. Of note, Amn MM was not a part of this friend group. AB EA and Amn MM did not know each other.

After AB EA and Appellant met, they exchanged phone numbers and communicated frequently on Snapchat. AB EA was married and did not spend any one-on-one **[*15]** time with Appellant, though she did visit his room once to "pop his back"[11] with Appellant's roommate present. AB EA and Appellant had no prior dating relationship and had not engaged in any sexual conduct with each other.

When asked at trial, AB EA testified that she considered Appellant "[s]ome-where between an acquaintance and a friend." However, AB EA agreed that she saw him every single day and may have told AFOSI agents and the sexual assault nurse examiner (SANE) that he was a close friend. AB EA's roommate, Amn AG, described their friend group as "we were all good friends." AB EA testified that she knew Appellant and A1C PC were dating and on the date of the offense it was "possible" that she already knew they were married.

Appellant considered AB EA a close friend and testified they once had a Snapchat "streak" where they communicated on the application every day for roughly 38 to 42 days straight. Appellant trusted AB EA and on one occasion lent his car to her so Amn EA and Amn AG could go get some food. Another time, AB EA invited Appellant to Amn AG's birthday party, but Appellant's then girlfriend, A1C PC, was not invited.

A1C PC testified that Appellant and AB EA were close **[*16]** friends. A1C PC characterized her own relationship with AB EA as "cordial" but recalled feeling "[u]ncomfortable" when A1C PC was not invited to Amn AG's birthday party. A1C PC conceded that she was not friends with Amn AG but she did not like that only Appellant was invited to the party because it was known that A1C PC and Appellant were dating. On 1 November 2017, A1C PC completed technical training and departed for her first assignment at an installation outside Texas.

2. Sexual Assault of AB EA

a. AB EA's Trial Testimony

On 7 November 2017, Appellant and AB EA messaged

[10] This opinion uses her grade and initials as of the trial date.

[11] AB EA explained that she learned how to pop someone's back as a school sports trainer and that it required "someone to lay out on their stomach with the arms on their side while I do a manipulation with my hands on their spine." AB EA also noted that it was not necessary to remove any clothing.

on Snapchat and she agreed to visit his room to "pop his back." AB EA arrived between 1400 and 1500 hours and saw Appellant's roommate leaving. Another female Airman that AB EA knew of, but had never spoken to, saw AB EA in the hallway.

When AB EA knocked on his door, Appellant answered wearing "underwear" but no shirt. AB EA thought it was "kind of" odd that Appellant answered the door as he did but she did not give it much thought. She explained that Appellant "is a free spirit" which she described as "nonchalant" and "kind of carefree." After AB EA entered the room Appellant shut his door telling AB EA that his music **[*17]** was too loud.

Soon after, Appellant began trying to convince AB EA to kiss him. AB EA told Appellant that she did not want to kiss him and turned her head away when he tried. She also told him that was not why she was there. Appellant replied that there was a "connection" between them and they did not have to fight it anymore. AB EA told Appellant that his statement about a connection between them was "false." At this point, AB EA was not concerned because she thought she could handle Appellant's attempts to kiss her.

Appellant then began to feel AB EA's vaginal area over her shorts. AB EA told him to stop and backed away from him going further into the room. Appellant then tried to pull down her shorts with one hand but she pulled them back up. Appellant then used both hands and succeeded in pulling her shorts down leaving her underwear on. Appellant then moved her underwear to the side and began to "aggressively finger" her "hard and fast." AB EA told Appellant to stop again and that he was hurting her as he penetrated her vagina with his finger.

AB EA kept backing up and the two reached Appellant's bed where AB EA ended up on her back on the bed. While still standing, Appellant removed **[*18]** her underwear and continued to penetrate her vaginally with his fingers. AB EA told him to stop. Instead, Appellant pulled down his pants and while standing penetrated AB EA vaginally with his penis. Appellant told AB EA to "quit fighting it" and that he "knew that [she] wanted him." AB EA propped herself up on her arms and began to back up to where "two walls met" in a corner behind the bed. Appellant got on the bed, on his knees, and continued to penetrate her vaginally with his penis. AB EA tried to push away from the wall but Appellant continued and this threw her back into the corner of the two walls.

At some point, Appellant slowed down and told AB EA to turn over. She refused so he stopped penetrating her and tried to turn her over. He was only partially successful which left AB EA at an awkward angle on her side. When AB EA tried to turn onto her back Appellant used his forearm to press down against her shoulder area. Appellant penetrated AB EA vaginally again with his penis and she again told him to stop and that she did not want to do this. Appellant replied that she was "already doing this." This comment made AB EA mad and she "clawed" Appellant's right arm with her left **[*19]** hand. Appellant did not respond to being clawed.

Eventually Appellant told AB EA that he was going to grab a condom and retrieved one from the nightstand next to his bed and put it on. Appellant tried unsuccessfully to penetrate AB EA vaginally again. At one point, AB EA heard a pop noise and Appellant said "I hate condoms." Appellant then put his head between AB EA's legs and penetrated her vagina with his tongue only for a few seconds before she "crushed his head" with her legs. Appellant resumed trying to penetrate her vaginally with his penis and was again unsuccessful. He then reached for a bottle of lubricant from his nightstand. At this point, AB EA began hysterically crying and telling him to stop. According to AB EA "I guess [he] came to his senses that I was genuinely upset, so he backed off."

As AB EA searched for her clothes, Appellant went to the bathroom and flushed the condom down the toilet. Once dressed, AB EA headed for the door just as Appellant came out of the bathroom. Appellant said "[d]on't tell [A1C PC]." AB EA replied either "I won't" or "I wouldn't." AB EA headed immediately back to her room.

b. Disclosure to Amn AG and Amn KC

When AB EA returned to her room, **[*20]** her roommate, Amn AG, was in the shower. Amn AG heard the door to their room slam over the sound of the shower. Amn AG heard AB EA crying, described as "wailing," through the bathroom door and over the sound of the shower. Amn AG turned off the shower and quickly exited the bathroom.

A second friend, Amn KC, was also in AB EA's room when AB EA returned. Amn KC had fallen asleep on Amn AG's bed while watching Netflix. Amn KC recalled "I heard a noise, which is what woke me up, and then it was [AB EA] crying" and "trying not to look at me." Amn KC described AB EA as "crying uncontrollably" and unable to speak. AB EA would "try to get words out, but

it just made her cry harder."

Once Amn AG exited the bathroom, she saw Amn KC holding and comforting Amn EA on Amn AG's bed. Amn AG got dressed as fast as she could and joined the other two on her bed. Amn AG recalled AB EA "crying to the point where she could barely get words out" with her hands on her face. Amn AG and Amn KC "were just holding" AB EA. Amn AG recalled AB EA crying for 15 to 20 minutes where all she could say was "I can't tell you." During this time, Amn AG reassured AB EA that "it's okay, you can tell us" and AB EA eventually **[*21]** said Appellant "wouldn't stop" and then explained to her friends what happened.

AB EA told her friends that she "felt gross and wanted to shower." At first, Amn AG said "okay. Great idea. Like get a shower and feel better." As Amn AG started walking towards the shower she reconsidered and said "wait" and explained that if AB EA "wanted to have a decision [to report], if she went in the shower she wouldn't have as much evidence for herself to make that decision." Amn AG asked AB EA, "[C]an you trust me[?] Can we just take a minute?" Amn AG continued, "[Y]ou don't have to decide anything right now, but can we pause on the shower and maybe go speak to the chaplain? That way you have a choice; you know, unrestricted or restricted." AB EA said, "[O]kay."

Amn KC led the three downstairs to visit the chaplain with AB EA in the middle and Amn AG walking behind AB EA. They walked in this order in case they ran into Appellant or anybody who tried to talk to AB EA. Once at the chaplain's office, Amn KC recalled AB EA "didn't really speak all that much; [s]he was still crying. And then [Amn AG] kind of told him, 'hey, my friend was just raped. We weren't really sure what to do. What's our next step[?]" **[*22]** In response, the chaplain called the sexual assault response coordinator's number, handed AB EA the phone, and left the room. AB EA was connected to a victim advocate who later met AB EA at the hospital for a sexual assault forensic examination (SAFE). Amn AG drove AB EA to the hospital and Amn KC accompanied them. On the drive to the hospital, AB EA called her mother and told her what happened.

c. SAFE

On arrival at the hospital, AB EA's report was still restricted, which meant that no law enforcement agency was involved. Nurse MJ, a certified SANE who had performed about 300 examinations, obtained AB EA's consent to perform the SAFE and obtained a narrative description from AB EA. The narrative was typed, signed by Nurse MJ, and attached to her report which was admitted into evidence. Regarding what happened in Appellant's room, the narrative is largely consistent with AB EA's recollections at trial. Of note, the narrative said AB EA scratched and clawed Appellant's arm.

There are some minor differences between what Nurse MJ wrote in the narrative and AB EA's trial testimony. We mention three of them which are representative of how minor the differences were. First, Nurse MJ wrote that **[*23]** AB EA and Appellant "were close friends" rather than between an acquaintance and a friend. Second, in describing the oral sex Appellant performed on AB EA, Nurse MJ wrote that Appellant was "trying to give [AB EA] oral [sex], [AB EA] guess[ed] for lubrication. That didn't last very long." Nurse MJ's narrative did not mention that AB EA crushed Appellant's head after he started to perform oral sex on her. Third, regarding their positioning on the bed, Nurse MJ wrote that AB EA "hit the wall and had nowhere to go." However, Nurse MJ's narrative did not mention that when Appellant "kept penetrating [AB EA]" it was "throwing [AB EA] back into the wall."

During the physical examination of AB EA, Nurse MJ collected a vaginal swab, fingernail scrapings, and hand swabs. Nurse MJ noted where AB EA reported pain during the examination and took photographs which were admitted into evidence. Particularly, Nurse MJ reported seeing "really bright red" blood that was "mucusy" in the cervical orifice so she "cleaned that blood out and it revealed redness[12] at the os, which is the opening." Nurse MJ could not positively say "without a shadow of a doubt" that the blood she cleaned away was not menstrual **[*24]** blood. However, Nurse MJ noted "a lot of tenderness in that area" and "acute pain" during swabbing.

Nurse MJ photographed and noted in her report a "2x2 cm purple bruise and abrasion" on AB EA's mid-lumbar region, "just right of the spine." Nurse MJ also

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[12] An expert SANE testifying for the Defense opined, from the photos taken by Nurse MJ, that the redness in AB EA's cervix opening was indicative of a medical condition, an ectropian cervix. The Defense's expert noted that symptoms of an ectropian cervix after intercourse can be pain, a "little bit of bleeding," and a "mucous discharge." While Nurse MJ had never personally seen this medical condition in her SAFEs, she was aware of the condition and its description. Based on her examination, Nurse MJ disagreed with the opinion of the Defense's expert that AB EA's cervix was ectropian.

photographed and noted in her report that there was "3 cm re linear scratch under [AB EA's] right scapula." AB EA related that she did not know the cause of either injury.

d. Investigation

Initially, AB EA did not want to make an unrestricted report. AB EA explained at trial that her reasons included the "close knit friend group" that she shared with Appellant and because she wanted to avoid testifying at a trial. However, the next day, 8 November 2017, AB EA made an unrestricted report and the sexual assault response coordinator notified AFOSI. SA PA, who was the lead investigator in the case involving Amn MM, assisted in the initial steps of Appellant's investigation involving AB EA.

SA PA interviewed AB EA's victim advocate who provided initial details of AB EA's SAFE and the narrative AB EA provided. Search authority was obtained for Appellant's dormitory room. Condoms and lubricant were seized from Appellant's nightstand next to his **[*25]** bed. His room was photographed and seven of those photos were later admitted into evidence. The search authorization also included a SAFE for Appellant, conducted by Nurse MJ, while the AFOSI agents waited outside the examining room.[13]

Nurse MJ collected standard specimens from Appellant which included a saliva sample, buccal swabs, and penile swabs. Nurse MJ photographed Appellant's upper right arm which had "abrasions or scratches" on it. At trial, Nurse MJ described them as "scattered scratches" which were "by the shoulder and bicep area. They're just linear, coming downward." Nurse MJ noted there was redness and inflammation on the scratches which she described as "fairly new." Nurse MJ asked Appellant where he got the scratches and he replied, "I was scratched during football."

On 9 November 2017, AFOSI agents interviewed AB EA with her victim advocate and special victims' counsel present. After this interview, AB EA agreed to call Appellant while AFOSI agents recorded the call. AB EA began the call by telling Appellant that she received a text message from A1C PC, Appellant's spouse, which was a ruse. Appellant replied, "I'm not supposed to be talking to you right now." AB EA asked **[*26]** why A1C PC texted her and Appellant said, "I told her what happened. I'm under investigation. I'm not living in the dorm any more. I'm already going to go to jail for what happened. I'm not supposed to be talking to you because everything that happened shouldn't have happened." When AB EA asked what Appellant told A1C PC, he responded "I'm not supposed to be talking to you right now. I have to go before I get in more trouble." AB EA told Appellant it was okay and he replied "I'm sorry. No, I don't want to get in more trouble. I'm not trying to get in any more trouble, okay. I'm sorry. I've got to go." Appellant made no additional statements to AFOSI agents about the incident with AB EA.

The samples collected from the SAFEs of AB EA and Appellant were sent to the United States Army Criminal Investigations Laboratory (USACIL) for analysis. At trial, a forensic biologist, Ms. MC, testified to the results in four parts.

First, semen was found on AB EA's vaginal swab. Ms. MC performed additional DNA testing on the vaginal swab, found DNA, and Appellant was included on the DNA profile.[14] Ms. MC's findings were "[t]he DNA profile is at least one quintillion times more likely if [Appellant] is **[*27]** included as a contributor than if he is not."

Second, Ms. MC conducted DNA testing on Appellant's penile swab. AB EA was included in the DNA profile. Ms. MC's findings were "[t]he DNA profile is at least one quintillion times more likely if it originated from [Appellant] and [AB EA] than if it originated from [Appellant] and an unknown individual."

Third, Ms. MC conducted DNA testing on AB EA's hand swabs.[15] Her findings were "[t]he DNA profile from the hand swabs is at least one quintillion times more likely if it originated from [AB EA] and [Appellant] than if it originated with [AB EA] and an unknown individual."

Fourth, Ms. MC used a different method, Y STR DNA

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[13] Nurse MJ's report also includes the written "Consent for Evidence Collection and Release" signed by Appellant.

[14] Ms. MC explained that she used autosomal STR testing, the most discriminating type of testing that she can do. Autosomal testing involves looking at the short tandem repeats on the chromosomes that do not involve the X or Y chromosome. Autosomal STR testing was done on the vaginal swab and hand swabs of AB EA and the penile swab of Appellant.

[15] Also on the hand swabs of AB EA, Ms. MC found a chemical indication of blood on a presumptive test for biological fluids. Ms. MC elected not to do a confirmatory test as it was more important to conserve the swabs for the DNA testing and for subsequent testing, if needed.

testing,[16] on AB EA's fingernail scrapings. Ms. MC found a mixture of two male individuals. Ms. MC was "not able to exclude Appellant or his paternal male relatives from the major DNA profile," which contributed more DNA to the sample. Ms. MC did a statistical analysis of the major DNA profile and concluded "[t]he probability of seeing this DNA profile again in the same population group as [Appellant] . . . is one in 1852." Ms. MC reported the best statistic she could obtain for Y STR DNA testing is "[p]robably somewhere in the **[*28]** range of 1 in 2000."

e. Appellant's Trial Testimony and Trial Result

Appellant conceded that he penetrated AB EA's vulva with his finger but he denied being aroused sexually or sexually gratified by it. Appellant denied penetrating her vulva with his tongue, but conceded that he penetrated her vulva with his penis.

Appellant agreed that AB EA came to his room to pop his back. He agreed he was not wearing a shirt when he answered the door, but testified he was wearing "PT shorts," not underwear. Appellant recalled that they engaged in small talk while he was laying on his bed and she was sitting on the foot of the bed. Appellant remembered inviting AB EA to "lay down" and they "started to spoon" with "no space in between [them]." A minute or two later, Appellant recalled moving her hair and kissing her neck and then placing his left hand "through the back side of her pants" in an "attempt to finger her." Appellant testified there was no protest from AB EA.

As the angle was awkward, Appellant testified that AB EA rolled onto her stomach and "[spread] her legs open a little bit . . . to show [him] that she's giving [him] access so [he] can actually finger her." Appellant recalled her moaning **[*29]** a little bit. Appellant described this as "still a very awkward angle" so he asked her to roll over onto her back and take off her pants, which were "some form of athletic shorts." Appellant testified that she took off her shorts and had her underwear on which he moved aside and began to "finger her again" without protest.

Appellant recalled the two kissing before he asked AB EA if she wanted him to wear a condom. He testified that she responded "I don't care." Appellant recalled getting off the bed, retrieving a condom, putting it on with two hands, and that AB EA removed her underwear and placed them on the side of the bed. After he penetrated her with his penis, Appellant testified that she reacted with "soft moans," wrapping around him, and then "squeezing the bed sheets." Appellant testified they switched positions, so he was behind her and they resumed intercourse until the condom dried out. He then got off the bed, retrieved lubrication from his nightstand drawer, and put it on the condom. Appellant recalled AB EA now being on her back and he penetrated her with his penis and when he started to go "faster and harder" her body started to tense up and then she softly said "stop." **[*30]** Appellant "slowed down" because he took "stop" to mean stop going so hard. After a few more minutes, Appellant saw on AB EA's face that something was bothering her and then she told him to stop and pushed him back so he stopped immediately. Appellant asked what was wrong and her response was "[w]e shouldn't be doing this, you have a wife." Appellant went to the bathroom and flushed the condom down the toilet. On return he saw AB EA dressed and appearing "[l]ike she's in regret" and "not like angry upset, just more like, '[w]hy did I do this?'" Appellant asked if she was going to tell A1C PC, and AB EA said "No, I'm not going to tell [A1C PC]."

Appellant testified that he received a no-contact order the next day or the day after. Regarding the audio recording of the call where he said everything that happened should not have happened, Appellant testified he was referring to cheating on his wife.

On cross-examination, Appellant denied penetrating AB EA without a condom. To his knowledge, the condom did not break and he did not feel it break. Regarding the recorded phone call and the reference to going to jail, he testified he was referring to adultery because he had "heard that you can **[*31]** go to jail for

adultery."[17] In response to questioning by the military judge, Appellant stated that he searched on Google for

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[16] Ms. MC explained that Y STR DNA testing involves looking at short tandem repeats on the Y chromosome and is not as discriminating as autosomal STR testing because the Y chromosome is paternally inherited.

[17] ***HN1***[↑] Adultery is a violation of *Article 134, UCMJ, 10 U.S.C. § 934*. The elements include (1) wrongful sexual intercourse; (2) when the military member or the other person was married; and (3) under the circumstances, the conduct is either prejudicial to good order and discipline or of a nature to bring discredit upon the armed forces. *MCM*, pt. IV, ¶ 62.b. A court-martial conviction for adultery carries a maximum confinement term of one year. *MCM*, pt. IV, ¶ 62.e.

adultery as a crime in the military and learned "it's a possibility" that he could go to jail.

Despite Appellant's testimony, the military judge convicted him of sexually assaulting AB EA as charged.

II. Discussion

A. Legal and Factual Sufficiency

1. Additional Background

a. Amn MM

Appellant raises multiple challenges regarding the sufficiency of the evidence underlying his convictions involving Amn MM. He asserts their prior sexual relationship was "violent in nature." He states that Amn MM admitted it was mutually understood that when she visited him it was for the purpose of having sex.[18] He claims he "mistook her appearance at his dorm room as an indicator for sex and violent sex at that." Appellant argues that once Amn MM told him to get off her, he complied and allowed her to leave his room.

Appellant points to portions of his own testimony to support why he was mistaken that Amn MM consented to the sexual activity and the face slap. Regarding the face slap and how hard he struck Amn MM, he asserts that he responded to her prior "criticisms" that he "hit like **[*32]** a bitch." Appellant argues that Amn MM's clothes were not ripped or damaged, and afterwards she only texted him about being slapped. He argues the Government called no witnesses who overheard the struggle Amn MM described. Finally, he claims that Amn MM had a "clear motive" to lie to preserve both her new relationship and her reputation once her facial injury could not be concealed.

The Government argues that the factfinder received sufficient evidence and could have found the elements of each offense were proven beyond a reasonable doubt. The Government disagrees that Appellant had an honest and reasonable mistake of fact that Amn MM consented to either offense because of their prior sexual activities and highlights the differences with their prior activities. The Government argues that Amn MM was a credible witness who never claimed that her clothing was ripped or damaged or that others overheard the encounter with Appellant. The Government counters Amn MM's alleged motive to misrepresent to preserve a relationship by noting the absence of cross-examination on this point. Regarding Amn MM's need to explain her facial bruising, the Government argues Amn MM immediately reported what **[*33]** happened to A1C AP before the bruising was reported to others.

b. AB EA

Appellant states that even if we believe AB EA's account of what happened, the evidence supports that he reasonably believed she consented to sexual intercourse. Appellant reminds us that AB EA entered his room willingly, did not attempt to leave, never screamed or called for help, never fought him off, and never moved or forcibly protested when he started to remove her clothes. In his view, "[w]ith perhaps one exception, [AB EA] similarly did not significantly struggle" and "admitted to simply lying on his bed" and staying there even when he stopped to retrieve a condom, and later lubricant. Appellant claims that AB EA "merely" scratched his arm and that she testified he had no reaction to it which means it must have been insignificant. Appellant finds "most instructive" that AB EA acknowledged that Appellant was surprised to learn she was not consenting and when he saw she was "genuinely upset" he "backed off." He points to his testimony that AB EA allowed him to kiss her, exhibited signs of pleasure, and only during sex indicated that something bothered her which caused him to stop immediately. Afterwards, Appellant **[*34]** believed AB EA was very conflicted, like she felt as though she had made a mistake.

Separately, Appellant challenges AB EA's credibility on two grounds. First, that AB EA adamantly denied he was a close friend even though she used those exact words to Nurse MJ. Second, Appellant questions why AB EA testified at trial that on the day in question he may have only been dating A1C PC when AB EA actually knew he was married and told this fact to Nurse MJ.

The Government responds that it proved that AB EA did not consent beyond a reasonable doubt and that Appellant did not have a reasonable mistake of fact as

[18] Trial defense counsel asked Amn MM, "Now didn't you tell us, in your pretrial interview, when you were going up to his room it was sort of understood that coming over would mean sex, correct?" Amn MM replied, "Sort of; yes, sir."

consent. The Government concedes that Appellant denied penetrating AB EA with his tongue, but argues the remaining elements of the offenses, except consent, are not in dispute. The Government argues that AB EA was credible and the inconsistencies regarding whether Appellant was a close friend or had already married A1C PC are minor inconsistencies unrelated to the offenses. According to the Government, AB EA reported a consistent account to her roommate, to Nurse MJ, and in her trial testimony. Further, the Government recites the corroborating forensic evidence and the pretext recorded **[*35]** call where Appellant admitted he was already going to jail for what happened.

2. Law

HN2[] We review issues of legal and factual sufficiency de novo. *United States v. Washington, 57 M.J. 394, 399 (C.A.A.F. 2002)* (citation omitted). Our assessment of legal and factual sufficiency is limited to the evidence produced at trial. *United States v. Dykes, 38 M.J. 270, 272 (C.M.A. 1993)* (citations omitted).

HN3[] The test for legal sufficiency of the evidence is "whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt." *United States v. Turner, 25 M.J. 324, 324 (C.M.A. 1987)* (citation omitted); *see also United States v. Humpherys, 57 M.J. 83, 94 (C.A.A.F. 2002)* (citation omitted). "[I]n resolving questions of legal sufficiency, we are bound to draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Barner, 56 M.J. 131, 134 (C.A.A.F. 2001)* (citations omitted). "The term reasonable doubt, however, does not mean that the evidence must be free from conflict." *United States v. Wheeler, 76 M.J. 564, 568 (A.F. Ct. Crim. App. 2017)* (citing *United States v. Lips, 22 M.J. 679, 684 (A.F.C.M.R. 1986))*, *aff'd*, *77 M.J. 289 (C.A.A.F. 2018)*.

HN4[] The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [we are] convinced of the [appellant]'s guilt beyond a reasonable doubt." *Turner, 25 M.J. at 325*. "In conducting this unique appellate role, we take 'a fresh, impartial look at the evidence,' applying 'neither **[*36]** a presumption of innocence nor a presumption of guilt' to 'make [our] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt.'" *Wheeler, 76 M.J. at 568* (alteration in original) (quoting *Washington, 57 M.J. at 399*).

For the abusive sexual contact of Amn MM, a violation of *Article 120, UCMJ*, the Government had to prove beyond a reasonable doubt: (1) Appellant committed sexual contact upon Amn MM by touching her hips through the clothing; (2) Appellant did so by causing bodily harm to her, to wit: touching her hips through the clothing without her consent; and (3) Appellant did so with intent to gratify his sexual desire. *See Manual for Courts-Martial, United States* (2016 ed.) (*MCM*), pt. IV, ¶ 45.b.(8)(b). In this context, the term "sexual contact" means "any touching . . . either directly or through the clothing, [of] any body part of any person, if done with an intent to arouse or gratify the sexual desire of any person." *See MCM*, pt. IV, ¶ 45.a.(g)(2)(B). ***HN5***[] "Bodily harm" means "any offensive touching of another, however slight, including any nonconsensual sexual act or nonconsensual sexual contact." *See MCM*, pt. IV, ¶ 45.a.(g)(3). "Consent" means a freely given agreement **[*37]** to the conduct at issue by a competent person. *See MCM*, pt. IV, ¶ 45.a.(g)(8)(A). An expression of lack of consent through words or conduct means there is no consent. *Id.*

For the assault consummated by a battery of Amn MM, a violation of *Article 128, UCMJ*, the Government had to prove two elements beyond a reasonable doubt: (1) Appellant did bodily harm to Amn MM, by striking her in the face with his hand; and (2) the bodily harm was done with unlawful force or violence. *See MCM*, pt. IV, ¶ 54.b.(2). ***HN6***[] "Bodily harm" means any offensive touching of another, however slight. *See MCM*, pt. IV, ¶ 54.c.(1)(a).

For the offenses involving AB EA, the elements of sexual assault varied among the three charged specifications. For the penetrations involving Appellant's finger and tongue, which were two separate violations of *Article 120, UCMJ*, the elements included: (1) that at the time and place alleged, Appellant committed a sexual act, to wit: penetrating AB EA's vulva with his finger and tongue; (2) that Appellant did so by causing bodily harm, to wit: penetrating her vulva with his finger and tongue without her consent; and (3) that Appellant intended to gratify his sexual desire. *See MCM*, pt. IV, ¶ 45.b.(4)(b). **[*38]** For the penetration involving Appellant's penis, also a violation of *Article 120, UCMJ*, the elements included: (1) that at the time and place alleged, Appellant committed a sexual act, to wit: penetrating AB EA's vulva with his penis; and (2) that Appellant did so by causing bodily harm, to wit:

penetrating her vulva with his penis without her consent. *See MCM*, pt. IV, ¶ 45.b.(3)(b).

HN7[] In this context, "sexual act" includes either (1) contact between the penis and vulva where contact involving the penis occurs upon penetration, however slight; or (2) the penetration, however slight, of the vulva of another by any part of the body with an intent to arouse or gratify the sexual desire of any person. *See MCM*, pt. IV, ¶ 45.a.(g)(1). The definitions of "bodily harm" and "consent" are the same as described above with the abusive sexual contact offense involving Amn MM.

3. Analysis

a. Amn MM

We begin with Appellant's conviction for abusive sexual contact by touching Amn MM's hips through her clothing. A reasonable factfinder could have concluded that Appellant tried to pull Amn MM's leggings down, as she testified, despite his denials in his testimony. During this tug of war with **[*39]** Amn MM's leggings, a reasonable factfinder could have concluded that Appellant touched Amn MM's hips through her clothing without her consent. On the final element, whether Appellant touched Amn MM in this manner to gratify his sexual desire, a reasonable factfinder could have relied on the strong circumstantial evidence of the words and actions of Appellant to find this element satisfied. A reasonable factfinder could have discounted Appellant's testimony that "sexual gratification was not on my mind" and instead given more weight to his earlier written sworn statements to law enforcement in determining his intent. For example, those statements used wording such as "kissing wasn't working to the point *I needed*" (emphasis added), and that he was caught in the "heat of the moment."

A reasonable factfinder could also have rejected a mistake of fact defense because even if Appellant was mistaken, as he claims, such a mistake was not reasonable under the circumstances. Both Appellant and Amn MM agreed that she was not coming to his room for sex, which significantly reduced the importance of their prior dormitory meetings for consensual sex. The reason that Amn MM was not going to have sex **[*40]** with Appellant was because he had called her an offensive name when she decided to pursue a relationship with someone other than Appellant. While Appellant may have held out hope that his face-to-face apology would be sufficient to erase his callous name calling and permit their sexual relationship to continue, Amn MM's physical movement to leave the room after his "apology" was a blatant signal that he ignored. He recognized this exact point in his second statement to law enforcement when he wrote "Looking back I . . . should [have] just let her leave." But he did not.

The subsequent signs that a mistake would be unreasonable under the circumstances would not be difficult for a factfinder to see. A factfinder could conclude that Amn MM physically resisted Appellant and said words to him such as "no. Stop. Don't do that. Get off." Even Appellant, at varying times, acknowledged that he met physical resistance when he described Amn MM as "jerking" her head when he tried to kiss her and squirming away, though he also used more benign language elsewhere in his testimony. To resolve any lingering dispute, a reasonable factfinder could have looked to Appellant's second statement to law enforcement **[*41]** when he wrote there "were multiple signs I should [have] paid more attention to" and determined his repeated failures to pay attention made a mistake of fact wholly unreasonable under the circumstances.

Turning to the assault consummated by a battery, there was no dispute about how hard Appellant hit Amn MM in the face or the injury he caused. A reasonable factfinder could have found that a strike of such force was in direct response to Amn MM's rebukes of Appellant's sexual contact and her subsequent physical push of Appellant. Amn MM's testimony on this point was consistent with her immediate report to A1C AP that she pushed Appellant off of her and he hit her in the face. In deciding the weight to give Appellant's testimony to the contrary, a reasonable factfinder would have considered if it was even possible to reconcile the conflicting statements Appellant made, at various times, as to why he struck Amn MM and how she responded. A reasonable factfinder could have determined that some of Appellant's statements were less than truthful and that his credibility was highly suspect. Finally, to the extent that there was evidence regarding Amn MM's motives to misrepresent available to **[*42]** the finder of fact, these could have been reasonably discarded as unimportant in light of Amn MM immediately seeking out A1C AP and disclosing what happened.

Drawing "every reasonable inference from the evidence of record in favor of the prosecution," the evidence was legally sufficient to support Appellant's conviction of

abusive sexual contact and assault consummated by a battery of Amn MM beyond a reasonable doubt. *Barner, 56 M.J. at 134* (citations omitted). Moreover, having weighed the evidence in the record of trial and having made allowances for not having personally observed the witnesses as the military judge did, we are convinced of Appellant's guilt beyond a reasonable doubt. *See Turner, 25 M.J. at 325*. Appellant's convictions involving Amn MM are both legally and factually sufficient.

b. AB EA

At trial, Appellant's defense had four major components: (1) AB EA consented to the penetration of her vulva by his finger; (2) the penetration with his finger was not for his sexual gratification, but hers; (3) AB EA consented to the penetration with his penis; and (4) he never penetrated her vulva with his tongue. Additionally, he presented a reasonable mistake of fact as to consent defense to the three offenses. On appeal, Appellant **[*43]** argues that a reasonable factfinder would have found he possessed a reasonable mistake of fact that AB EA consented to the sexual activity and acquitted him of the charged offenses.

In evaluating whether this defense was available to Appellant, a reasonable factfinder would have considered all of the relevant evidence presented. This would have included the matters not in dispute, such as AB EA entering Appellant's room willingly. However, a reasonable factfinder would have also considered that there was no prior sexual relationship between the two of them and the agreed purpose of the visit was for AB EA to pop Appellant's back.

Appellant asserts a litany of things that AB EA did not do, such as leave, scream, call for help, fight him off, move or forcibly protest when her clothes were removed, or resist more vigorously. He also argues she stayed on the bed when he retrieved a condom and lubricant. Certainly, a reasonable factfinder would have considered all of the relevant evidence. But, Appellant ignores other evidence, available to the factfinder, which included AB EA turning her head when he attempted to kiss her, saying she was not there for this reason, denying they had a connection, **[*44]** pulling her shorts back up after he pulled them down, telling him to stop and that he was hurting her while he fingered her, backing away from him, resisting so Appellant would say to her "quit fighting it," pushing away from the walls, resisting turning over, telling him she did not want to do this, clawing and scratching his arm after he said she was "already doing this," crying, and when he tried to perform oral sex on her crushing his head with her legs. A reasonable factfinder could have found that a mistake of fact, if held, was unreasonable in light of AB EA's testimony.

Appellant finds "most instructive" that AB EA acknowledged that Appellant was surprised to learn she was not consenting and when he saw she was "genuinely upset" then he "backed off. This fact lends some credence that Appellant may have had an honest mistake of fact, but it does not mean such a mistake was reasonable under the circumstances. Consent requires a "freely given agreement." *See MCM*, pt. IV, ¶ 45.a.(g)(8)(A). ***HN8***[] As the United States Court of Appeals for the Armed Forces (CAAF) has said, the "burden is on the actor to obtain consent, rather than the victim to manifest a lack of consent." *United States v. McDonald, 78 M.J. 376, 380 (C.A.A.F. 2019)*. A reasonable **[*45]** factfinder could conclude that Appellant did not obtain consent from AB EA, making his claim that he honestly believed she consented to be unreasonable.

Additionally, AB EA's testimony did not stand alone; there was powerful evidence from other witnesses. Amn KC and Amn AG both testified how upset AB EA was immediately after she arrived back in her room. After wailing so loud that Amn AG could hear her in the shower and being comforted by Amn KC on the bed, eventually AB EA could utter the words "he wouldn't stop." Similarly, AB EA's narrative to Nurse MJ during the SAFE provided support as it included statements that Appellant was told "stop" and "no" multiple times as well as that AB EA tried to leave. The narrative included Appellant's statement to AB EA to "[s]top fighting it" and that AB EA "started scratching and clawing his arm." Nurse MJ observed and photographed similar "fairly new" and "scattered scratches" on Appellant's arm during his SAFE.

While Appellant relies on his testimony to support his claim of mistake of fact, a reasonable factfinder could have discounted Appellant's version that AB EA allowed him to kiss her, exhibited signs of pleasure, that he stopped immediately **[*46]** when something was bothering her, and that she appeared regretful afterwards. Instead, a reasonable factfinder could have believed AB EA's testimony and the evidence which supported her testimony.

Appellant challenges AB EA's credibility, as he did unsuccessfully at trial. A reasonable factfinder could

conclude that whether Appellant and AB EA were "close friends" or between a "friend and acquaintance" was unimportant to whether the offenses occurred or whether Appellant had a reasonable mistake of fact defense. In a similar fashion, whether AB EA recalled accurately to Nurse MJ whether Appellant was married or dating A1C PC had little bearing on the charged offenses or a mistake of fact defense.

Drawing "every reasonable inference from the evidence of record in favor of the prosecution," the evidence was legally sufficient to support each of Appellant's convictions of sexual assault of AB EA beyond a reasonable doubt. *Barner, 56 M.J. at 134* (citations omitted). Moreover, having weighed the evidence in the record of trial and having made allowances for not having personally observed the witnesses as the military judge did, we are convinced of Appellant's guilt beyond a reasonable doubt. *See Turner, 25 M.J. at 325*. Appellant's **[*47]** convictions involving AB EA are both legally and factually sufficient.

B. Military Judge Recusal

1. Additional Background

Recusal was raised twice. The first time was in a defense motion filed prior to trial which the military judge denied. The second time was when the military judge *sua sponte* reconsidered his ruling after Appellant requested to withdraw his guilty plea to battery of Amn MM. We begin with the events that led to the Defense's pretrial recusal motion.

Appellant's case was originally set for trial on 4 June 2018. On 30 May 2018, Appellant and his two military defense counsel signed an offer for pretrial agreement (PTA) where *inter alia* Appellant would plead guilty to certain specifications and elect trial before military judge sitting alone in exchange for other offenses being dismissed and a cap on the amount of confinement that could be approved by the convening authority. On 1 June 2018, Appellant and his two military defense counsel signed a stipulation of fact. In reliance on the PTA offer and stipulation, the Government canceled the travel arrangements for certain witnesses needed for a contested trial. The PTA offer and stipulation were short-lived as Appellant withdrew **[*48]** the offer on 3 June 2018, the day before trial.[19] Given this development, also on 3 June 2018, Appellant's senior defense counsel filed a motion requesting a continuance. The Government did not oppose. The military judge who was detailed to the case, Colonel Jefferson B. Brown, granted the continuance until 18 September 2018. The senior defense counsel also moved to withdraw as Appellant expected to hire civilian defense counsel while Appellant's military defense counsel remained on the case. Judge Brown granted the Defense's motion to release the senior defense counsel. Shortly thereafter, the military judge who presided at trial was detailed and issued all subsequent rulings described in this opinion.

On 14 August 2018, Appellant's new defense team—his detailed military defense counsel and his civilian defense counsel—filed a motion for a continuance until 29 October 2018, due to a scheduling conflict with the Defense's expert psychologist consultant. The assistant trial counsel submitted the Government's response opposing the continuance and cited the earlier continuance that was granted to the Defense. For some reason, the assistant trial counsel attached Appellant's withdrawn PTA **[*49]** offer and stipulation of fact to his motion response when it was sent to the military judge.[20] The assistant trial counsel also wrote in his motion response, with citation to the withdrawn stipulation of fact,

> [Appellant] offered to plead guilty to sexually assaulting [AB] EA and committing aggravated sexual contact and assault consummated by [a] battery upon [Amn] MM. On 1 Jun[e] [2018], [Appellant] and Defense Counsel signed a stipulation of fact in which [Appellant] admitted that he had sex with [AB] EA and that [AB] "EA clearly told [Appellant] to stop. However, [Appellant] admits that he did not stop."

The assistant trial counsel's decision to include such details and attachments prompted the Defense to file the recusal motion. In the motion, trial defense counsel

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[19] The PTA and stipulation of fact in the record of trial only bear the signatures of Appellant and his military defense counsel. The Government's decision to stop some witness travel indicates support for the PTA.

[20] The Defense's recusal motion alleged this was a violation of Mil. R. Evid. 410 which prohibits, with limited exceptions, the admission of evidence regarding any statement made during plea discussions if the discussions did not result in a guilty plea. The Government, at trial, asserted this rule "does not apply" because the continuance motion "does not relate to the admission of evidence at trial." The military judge did not rule on the applicability of Mil. R. Evid. 410.

asserted that the military judge now had personal knowledge of disputed evidentiary facts concerning the proceeding which required his recusal under R.C.M. 902(b)(1). Alternatively, trial defense counsel asserted the military judge's impartiality might reasonably be questioned under R.C.M. 902(a). The Government opposed both grounds of the Defense's recusal motion. Regarding R.C.M. 902(b)(1), the Government asserted the military judge had no "personal knowledge" of **[*50]** the facts of the case that would require recusal under this rule. Regarding R.C.M. 902(a), the Government noted the military judge had made no statements regarding whether his impartiality would reasonably be questioned, that the law did not require his recusal, he had discretion to preside over the case, and could "simply choose not to read the PTA offer or the stipulation of fact." As the parties did not request argument at an *Article 39(a), UCMJ, 10 U.S.C. § 839(a)*, session, the military judge issued a ruling declining to recuse himself.[21]

At the initial *Article 39(a)*, UCMJ, session, the military judge inquired whether either side wanted to question or challenge him. Civilian defense counsel questioned the military judge on whether he read the PTA and stipulation that were attached to the Government's motion response. The military judge replied that he had not read the attachments to either the defense motion or the government response. The military judge also was questioned regarding whether he had formed any unfavorable opinions about the guilt or innocence of Appellant. The military judge indicated he had not formed any such opinions. Civilian defense counsel asked whether there was anything affecting his ability **[*51]** to be fair and impartial to Appellant. The military judge replied, "Absolutely nothing."

Shortly thereafter, Appellant requested trial by military judge alone and a written request was marked as an appellate exhibit. The military judge granted Appellant's forum choice and Appellant initially entered a plea of guilty to battery of Amn MM. After a providence inquiry, the military judge accepted Appellant's pleas and announced findings of guilty to this charge and specification. As Appellant pleaded not guilty to the remaining charge and specifications, the Government presented its findings case. As both specifications involving Amn MM were closely intertwined, Amn MM testified, over defense objection, to the circumstances of the battery. Appellant also testified regarding the battery and stated that he took Amn MM's mumbling as "strike me" so he smacked her across the face.

After Appellant's testimony in the Defense's findings case, the military judge stated that he was "going to reopen the providence inquiry" to address whether "it would have been unreasonable" for Appellant to hit Amn MM if, at the time of the slap, he thought she said "strike me." Referencing the earlier providence **[*52]** inquiry, the military judge stated "I don't believe he had mentioned—and perhaps my recollection is wrong—but [according to Appellant's testimony in findings] she literally asked to be hit." After a recess, Appellant requested to withdraw his guilty plea, which the military judge granted after finding good cause existed because a legal defense existed. The military judge explained to Appellant that under Mil. R. Evid. 410 he would "put . . . out of [his] mind" everything that Appellant told him during the providence inquiry.

The military judge then *sua sponte* reconsidered the defense motion for recusal. Citing R.C.M. 902 and caselaw,[22] the military judge found no reason for recusal and stated "I have no concerns about my ability to be impartial and to put that information out of my mind." The military judge asked whether either side wanted to question or challenge him. Neither party did.

On appeal, Appellant argues the military judge abused his discretion when he did not recuse himself (1) prior to the start of trial; and (2) after the withdrawal of the guilty plea. Prior to trial, Appellant asserts that R.C.M 902(b)(1) applies as the military judge had "prior knowledge of now-disputed evidentiary facts" and the **[*53]** circumstances raise "reasonable questions" about whether the military judge could serve as an impartial factfinder. After the withdrawal of the plea, Appellant argues the military judge's options were either to recuse himself or to direct trial by court members. He

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[21] The issue with the Defense's expert consultant was resolved prior to trial so the military judge never ruled on this continuance request.

[22] *United States v. Dodge, 59 M.J. 821 (A.F. Ct. Crim. App. 2004)*; *United States v. Melton, 1 M.J. 528, 530, 51 C.M.R. 176 (A.F.C.M.R. 1975)*. In *Melton*, our court's predecessor noted that the military judge may perceive the providence of plea is questionable because of a lack of understanding of the legal principles and potential defenses available and thus determine the better course of action would be to change the plea to not guilty, not because of any real factual dispute, but because of a misunderstanding of the legal effect of the facts. *1 M.J. at 531*. The *Melton* court found this showed a concern for fairness by the military judge, rather than suggesting any partiality or bias. *Id.*

claims it was "impossible" for the military judge or "any jurist" to serve as a fair, impartial factfinder after hearing two completely contradictory statements under oath from Appellant, one in the providence inquiry and the other during his findings testimony. Finally, Appellant argues the military judge should have followed the Discussion to R.C.M. 910(h) which states "recusal of the military judge or disapproval of the request for trial by military judge alone will ordinarily be necessary when a plea is rejected or withdrawn after findings." The Government responds the military judge did not abuse his discretion either time he declined to recuse himself.

2. Law

HN9[] We review a military judge's decision not to recuse himself for an abuse of discretion. *See* United States v. Sullivan, 74 M.J. 448, 454 (C.A.A.F. 2015). "A military judge abuses his discretion when: (1) the findings of fact upon which he predicates his ruling are not supported by the evidence of record; (2) if incorrect legal principles **[*54]** were used; or (3) if his application of the correct legal principles to the facts is clearly unreasonable." United States v. Ellis, 68 M.J. 341, 344 (C.A.A.F. 2010) (citing United States v. Mackie, 66 M.J. 198, 199 (C.A.A.F. 2008)). "The abuse of discretion standard is a strict one, calling for more than a mere difference of opinion. The challenged action must be 'arbitrary, fanciful, clearly unreasonable,' or 'clearly erroneous.'" United States v. McElhaney, 54 M.J. 120, 130 (C.A.A.F. 2000) (quoting United States v. Miller, 46 M.J. 63, 65 (C.A.A.F. 1997); United States v. Travers, 25 M.J. 61, 62 (C.M.A. 1987)).

HN10[] "An accused has a constitutional right to an impartial judge." United States v. Wright, 52 M.J. 136, 140 (C.A.A.F. 1999) (citations omitted). R.C.M. 902 governs disqualification of the military judge. R.C.M. 902(b) sets forth five specific circumstances in which a "military judge shall disqualify himself or herself." The first specific circumstance, in R.C.M. 902(b)(1), requires disqualification "[w]here the military judge has a personal bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceeding." R.C.M. 902(b)(1) applies the "same substantive standard" as its civilian counterpart, 28 U.S.C. § 455. United States v. Quintanilla, 56 M.J. 37, 45 (C.A.A.F. 2001). The Drafter's Analysis to R.C.M. 902(b) notes that "any interest or bias to be disqualifying must be personal, not judicial, in nature." *MCM*, App. 21, at A21-50.

HN11[] In addition, R.C.M. 902(a) requires disqualification "in any proceeding in which that military judge's impartiality might reasonably be questioned." Disqualification pursuant to R.C.M. 902(a) is determined **[*55]** by applying an objective standard of "whether a reasonable person knowing all the circumstances would conclude that the military judge's impartiality might reasonably be questioned." Sullivan, 74 M.J. at 453 (citing Hasan v. Gross, 71 M.J. 416, 418 (C.A.A.F. 2012)).

HN12[] "There is a strong presumption that a judge is impartial, and a party seeking to demonstrate bias must overcome a high hurdle particularly when the alleged bias involves actions taken in conjunction with judicial proceedings." Quintanilla, 56 M.J. at 44 (citation omitted). A military judge "should not leave [a] case 'unnecessarily.'" Sullivan, 74 M.J. at 454 (quoting R.C.M. 902(d)(1), Discussion). "Of course, '[a] . . . judge has as much obligation not to . . . [disqualify] himself when there is no reason to do so as he does to . . . [disqualify] himself when the converse is true.'" United States v. Kincheloe, 14 M.J. 40, 50 n.14 (C.M.A. 1982) (alterations in original) (citations omitted).

HN13[] "There is no *per se* rule that military judges are disqualified whenever, after accepting guilty pleas, they must later reject those pleas based on unforeseen circumstances." United States v. Winter, 35 M.J. 93, 95 (C.M.A. 1992). "Even more so, there is no invariable requirement that judges *sua sponte* recuse themselves in all such cases. *Id.* (citations omitted). "[E]ven though a judge is not *per se* disqualified from presiding over a bench trial after rejecting guilty pleas, the facts of **[*56]** a particular case may still require recusal of the military judge, especially if the judge has formed an intractable opinion as to the guilt of the accused." *Id.* (citing United States v. Bradley, 7 M.J. 332 (C.M.A. 1979)). A military judge's statements on the record may "make clear that he had no intractable opinion" regarding guilt or sentence. United States v. Bray, 49 M.J. 300, 306-07 (C.A.A.F 1998).

HN14[] "Where the military judge makes full disclosure on the record and affirmatively disclaims any impact on him, where the defense has full opportunity to *voir dire* the military judge and to present evidence on the question, and where such record demonstrates that [an] appellant obviously was not prejudiced by the military judge's not recusing himself, the concerns of R.C.M. 902(a) are fully met." United States v. Campos, 42 M.J. 253, 262 (C.A.A.F. 1995) (citation omitted).

3. Analysis

a. Recusal Prior to Trial

We find no abuse of discretion when the military judge denied the Defense's recusal motion before court convened. While the military judge's ruling was no more than a summary denial, we find no error. *See* United States v. Flesher, 73 M.J. 303, 312 (C.A.A.F. 2014) (noting if the military judge fails to place his findings and analysis on the record, less deference will be accorded). Our starting point is the strong presumption that a military judge is impartial.

We can quickly dispense with the argument that recusal was **[*57]** required under R.C.M. 902(b)(1) because the Government's motion response discussed the PTA and stipulation briefly and these documents were attached to the motion. ***HN15***[↑] Receiving a filing from a party does not give a military judge "personal" knowledge of the facts, disputed or otherwise, in a case. Rather, a military judge who receives a motion response is simply performing judicial duties. Exposure to what the parties are asserting are the facts does not impute "personal" knowledge to the military judge of disputed facts. We agree with the Drafters Analysis to R.C.M. 902(b) that interest or bias is only disqualifying when it is personal, not judicial, in nature. *See MCM*, App. 21, at A21-50. Appellant has not attempted to show the military judge had knowledge of the disputed facts of this case from a source independent of his judicial duties. Accordingly his claim that R.C.M. 902(b)(1) required recusal must fail.

We also find no error under R.C.M. 902(a) because the military judge's impartiality could not reasonably be questioned from his pretrial involvement in this case. While the military judge denied the motion before trial, at the initial Article 39(a), UCMJ, session he was questioned by civilian defense counsel. The military judge confirmed **[*58]** he had not read the attachments to the defense motion or the Government's response and had not formed any unfavorable opinions about Appellant's guilt or innocence. After civilian defense counsel indicated he had no further questions, the military judge, on his own, noted the recusal motion that he had ruled upon earlier. The military judge noted that while he was aware of the PTA and stipulation of fact, he had not read them and had not discussed them with the prior military judge. In response to a follow-up question by civilian defense counsel the military judge made clear there was "absolutely nothing" that would affect the military judge's ability to be fair and impartial. Shortly thereafter, Appellant selected a forum of military judge alone.

We find the questioning and commentary at the Article 39(a) session qualifies as a full disclosure on the record by the military judge, even if it came after his ruling, and an affirmative disclaimer of any impact from receiving the Government's motion response. *See* Campos, 42 M.J. at 262. The Defense had a full opportunity to voir dire the military judge and asked relevant questions that the military judge directly answered. *See id.* The military judge confirmed **[*59]** both sides had no additional evidence or argument on the recusal motion. Appellant had ample opportunity to present evidence on the question of recusal. Appellant was not obviously prejudiced as the military judge did not read the PTA or stipulation of fact and only read the brief commentary in the Government's actual motion, a matter which would easily been put out of the judge's mind once he learned the case was to be partially contested. Given these circumstances, we conclude the concerns of R.C.M. 902(a) were fully met. *See id.* Objectively, in light of applicable caselaw and the strong presumption that a military judge is impartial, a reasonable person knowing all the circumstances of the military judge's pretrial involvement and his responses on the record, including that no intractable opinions on guilt or sentence were held, would not conclude that the military judge's impartiality might reasonably be questioned. *See* Sullivan, 74 M.J. at 453.

b. Recusal after Withdrawal of Plea

First, we reject Appellant's claim that it would be impossible for any military judge to be a fair and impartial factfinder after the guilty plea to battery of Amn MM was withdrawn. This argument strikes us as the functional equivalent of **[*60]** a per se rule requiring recusal after a withdrawn plea which would be inconsistent with *Winter. See* 35 M.J. at 95.

We recognize that ***HN16***[↑] the facts of a particular case may still require recusal of the military judge after a guilty plea is withdrawn, especially if the judge has formed an intractable opinion as to the guilt of the accused. Here, the military judge had no intractable opinion regarding guilt. *See* Bray, 49 M.J. at 306-07. The military judge expressed that he would not consider the providence inquiry, would put it out of his mind, and described "resetting entirely the trial with regard to that

charge and its specification." The military judge provided citation to relevant caselaw on recusal and to R.C.M. 902 and briefly stated his findings and analysis. Therefore, we review his ruling on recusal after trial began for an abuse of discretion.

We find no abuse of discretion in the military judge's decision not to recuse himself after granting Appellant's request to withdraw his plea. We note that trial defense counsel did not raise recusal after the military judge told the parties he was reopening the providence inquiry or after Appellant entered a plea of not guilty to battery of Amn MM. Instead, it was the military judge who **[*61]** *sua sponte* reconsidered his earlier ruling. The military judge described the caselaw he relied upon, cited the correct legal standard, and announced that he would put out of his mind the information he had heard during the providence inquiry. The military judge stated on the record that he had "no concerns" about his ability to be impartial. The military judge invited both sides to voir dire him regarding recusal or to challenge him. Both declined. We find a full disclosure, affirmative disclaimer of impact, and full opportunity for questioning existed. *See* Campos, 42 M.J. at 262. We discern no obvious prejudice and find the concerns of R.C.M. 902(a) were fully addressed on the record. A reasonable person with knowledge of the circumstances would have come to the same conclusion the parties did at trial: the withdrawn plea did not raise reasonable grounds to question the military judge's impartiality given the applicable law.

Before us, Appellant argues that he made "completely contradictory statements" that would have led the military judge to conclude he lied under oath at some point. We see this matter differently. This case bears similarities to *Melton*, a case the military judge chose to cite when he issued his ruling. **[*62]** In our view, the military judge's decision to reopen the plea was to ensure Appellant understood the mistake of fact defense. Even during the providence inquiry, Appellant told the military judge that "at the very moment" he hit Amn MM he "did believe" that she had consented. This established the first element of the defense that Appellant had an honest mistake. All that remained was whether Appellant's belief was objectively reasonable. Unsurprisingly, Appellant's testimony in findings revealed that he struggled with judging his own actions by a reasonable person standard. At varying times, Appellant judged his actions personally, but with the benefit of hindsight, rather than by an objective standard at the time of the offense. As we see it, Appellant merely had difficulty understanding one of the legal principles involved in a mistake of fact defense. Like the court in Melton we see the military judge's response to reopen the providence inquiry demonstrated concern for fairness of the proceedings rather than some negative reflection on his impartiality.

We acknowledge that the discussion accompanying R.C.M. 910(h) states that in a trial by military judge alone recusal of the military judge or **[*63]** disapproval of the request for trial by military judge will "ordinarily" be necessary when a plea of guilty is withdrawn after findings. However, the Discussions accompanying the Rules for Courts-Martial are supplementary materials and do not have "the force of law." *See MCM*, pt. I, ¶ 4. We find our superior court's decisions in Sullivan, Campos, and Winter provide the appropriate framework for analyzing recusal and we decline to apply an "ordinary" rule when the inquiry requires a case-by-case determination. We find no abuse of discretion, and indeed no error, when the military judge did not recuse himself after Appellant withdrew his plea of guilty to battery of Amn MM.

C. Mil. R. Evid. 413

1. Additional Background

Before trial, in accordance with Mil. R. Evid. 413(b) and Mil. R. Evid. 404(b), the Government provided notice to the Defense of uncharged sexual assault offenses that Appellant allegedly committed upon a civilian, KM, prior to Appellant joining the Air Force. The notice indicated two of the offenses occurred on 24 June 2015 when Appellant, without consent, (1) attempted to penetrate KM's mouth with his penis, and (2) penetrated KM's vagina with his penis. The notice also indicated that the next day, 25 June 2015, Appellant attempted **[*64]** to penetrate KM's mouth with his penis without her consent and in the course of this attempt hit KM on the head and face with his hand. KM was 16 years old at the time and Appellant was 18 years old.

On 17 May 2018, Appellant's senior defense counsel, who was later released, filed a motion for appropriate relief to exclude this evidence. The Defense contended, *inter alia*, that the evidence was "highly inflammatory" and "unfairly prejudicial" as KM was under the age of 18 and the circumstances involved allegations of physical and sexual violence. The Defense asserted a distracting mini-trial involving numerous witnesses and potentially scientific and/or expert testimony would be needed and

that the uncharged misconduct failed a Mil. R. Evid. 403 balancing test. The Defense requested an *Article 39(a)*, UCMJ, session and requested six witnesses: KM and five members of the McKinney Police Department in Texas who investigated the allegations.

On 25 May 2018, the Government opposed the motion for appropriate relief contending *inter alia* that the evidence was admissible under Mil. R. Evid. 413 after the three threshold findings were made under *United States v. Wright, 53 M.J. 476, 482 (C.A.A.F. 2000)*, and alternatively admissible under Mil. R. Evid. 404(b) to show Appellant's plan, intent, absence of **[*65]** mistake, and motive with respect to the charged offenses.

A few days after the Government's motion response, the failed PTA negotiations occurred, the case was continued, and the senior military defense counsel who filed the motion for appropriate relief was released. The parties continued their preparations for trial, including which witnesses would be necessary for the Defense. While KM traveled for the trial, no McKinney Police Department officials were on the agreed-upon list of witnesses. No motion to compel witnesses or evidence was filed prior to trial, a matter we discuss in the next assignment of error.

During motion practice on the first day of trial, the military judge inquired whether the current defense team had any evidence to introduce. The Defense declined to offer evidence beyond the attachments to its motion, despite the written motion's assertions that six witnesses would testify. The Government also did not offer further evidence beyond the attachments to their motion. The parties argued their respective positions on admissibility.

The military judge issued a ruling denying the defense motion, finding the evidence admissible under Mil. R. Evid. 413[23] and later read his findings of fact **[*66]** and conclusions of law into the record. Accordingly, KM testified before the military judge as the last government witness.

KM[24] testified that she went to the same high school as Appellant for a time when he was a senior and she was a freshman. They knew each other by association and had mutual friends. They lost contact when KM went to a different school as a sophomore but reconnected on social media in the summer of 2015. On one afternoon, Appellant and KM agreed to meet in the parking lot of a store near KM's house. When Appellant arrived driving a sport utility vehicle (SUV), KM got in and he drove them to a covered parking area in a nearby apartment complex. Appellant began pressing KM's arm in a flirtatious way. KM realized Appellant had gotten the wrong idea about their meeting so she scooted towards the door. Appellant tried touching KM's breast and she pushed his hand away. Appellant responded, "[C]ome on. Why don't you let me touch this? Why don't you want to do this?" KM pulled further away and told Appellant she did not want him to touch her on her breast. After turning her body towards the car door, KM saw Appellant rubbing his "private area" over the top of his pants. When **[*67]** KM looked over, Appellant grabbed her arm and tried to get KM to touch his penis. KM pulled her arm away. This continued for a few minutes until Appellant succeeded in getting KM's hand to touch his "private area" but KM kept her hand clinched in a ball. Once KM yanked her arm away, Appellant pulled down his pants exposing his erect penis which he began touching. He then attempted to get KM to directly touch his penis but KM kept her hand in a fist. Appellant then grabbed the back of KM's neck and pulled her head towards his penis, but she turned her head to the side. The side of KM's face contacted Appellant's penis but not her mouth.

KM could not remember how the two of them came to be in the backseat but she did recall Appellant touching her breasts and inner thighs and her saying that she did not want to have sex with him. Appellant replied "come on, just do it" and "[i]t will be worth it" and then took off KM's pants and inserted his penis into her vagina. KM recalled not getting up because she "froze" and then "blanked out" and felt like she "couldn't move." KM testified that Appellant complained that she was not making noise and KM started muffled crying which annoyed Appellant **[*68]** so he stopped. KM recalled Appellant taking off a condom though she did not remember seeing him put a condom on. Afterwards, Appellant drove KM back to the store parking lot.

KM testified "[w]ithin the next few days" Appellant reached out to apologize and asked to meet again. When KM did not initially accept his apology, Appellant threatened to tell others they had sex. Appellant also told KM that she now needed to give him gas money when they met. KM agreed to meet and Appellant picked her up in the parking lot where she worked. KM

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[23] The military judge did not rule on whether the evidence was also admissible under Mil. R. Evid. 404(b).

[24] KM was married at the time of Appellant's court-martial and had a different last name. We use her initials at the time of the uncharged incidents involving Appellant.

thought the location would be safe because it was in the open. On arrival, Appellant asked KM to get in the SUV and she agreed because she did not want to make a scene. Appellant drove to a parking lot behind an elementary school that was near KM's house. KM testified that Appellant told her to get into the backseat, which she did, because she was afraid of him. Appellant tried to penetrate KM's mouth with his penis, but only the side of her face touched his penis. Appellant told KM to "get it over with" and to "make up for [her] not being willing to do it" before. KM teared up and did not reply. Appellant then asked her "are you deaf" and hit the side of **[*69]** her face near her ear with his hand. KM recalled looking at him in a "shocked way" and Appellant looked like he was "in shock as well." KM did not think Appellant meant to strike her but just got so frustrated that she would not do what he wanted that he "kind of snapped." KM testified, "[A]s soon as he had done it, [he] let go of me and opened the door and pushed me out of his car." KM unsuccessfully tried to get back in the SUV because her purse and cellphone were still inside but Appellant drove away. KM found her personal items on the road as she walked home.

KM told her best friend what happened with Appellant after the second incident. Her best friend advised KM to tell her parents and KM did. The matter was then reported to the McKinney Police Department. Appellant was never interviewed or arrested by the McKinney Police Department. He was never prosecuted for any offense involving KM.

During the investigation of the offenses involving Amn MM, AFOSI learned through background checks about the incidents with KM and interviewed KM. KM's interview was summarized in an AFOSI report which was before the military judge when he ruled on the admissibility of KM's testimony. Appellant **[*70]** was also questioned about the incidents with KM by AFOSI but this evidence was not provided to the military judge before he ruled.

In his trial testimony, Appellant described the two incidents where KM and he were alone in his SUV. He recalled a consensual sexual encounter with KM where he wore a condom that ended because it got hot in the SUV. He recalled them meeting the next day, or the day after, for sex. He confirmed that he asked KM for gas money because the SUV was a "gas guzzler." After KM got in the SUV, according to Appellant, KM said she was not going to give him gas money and that she did not want to have sex. Appellant admitted that he got "upset a little bit" and felt he was being "played" by KM so she could get a ride home from work. He testified that he stopped the SUV on the side of the road and asked KM to "please get out" of the SUV. When KM refused, Appellant testified that he unbuckled her seatbelt, asked her to leave again and when she did not leave he threw her personal items out of the drivers' side window. He denied any sexual acts or violence occurred with KM the second time that they were alone. In rebuttal to Appellant's trial testimony, SA PA testified that **[*71]** Appellant told AFOSI that he did not spend one-on-one time with KM and that he never engaged in activity involving a condom or a car with KM. In addition to SA PA's testimony, a short audio excerpt of this AFOSI interview of Appellant was also admitted as rebuttal evidence. The audio excerpt also covered Appellant's denials of spending one-on-one time with KM and being in a car with her and a condom.

2. Law

HN17[↑] A military judge's decision to admit evidence is reviewed for an abuse of discretion. *United States v. Jerkins, 77 M.J. 225, 228 (C.A.A.F. 2018)* (citing *United States v. Erikson, 76 M.J. 231, 234 (C.A.A.F. 2017)*.

HN18[↑] Mil. R. Evid. 413(a) provides that "[i]n a court-martial proceeding for a sexual offense, the military judge may admit evidence that the accused committed any other sexual offense. The evidence may be considered on any matter to which it is relevant." "This includes using evidence of either a prior sexual assault conviction or uncharged sexual assaults to prove that an accused has a propensity to commit sexual assault." *United States v. Hills, 75 M.J. 350, 354 (C.A.A.F. 2016)* (citing *United States v. James, 63 M.J. 217, 220-22 (C.A.A.F. 2006)*.[25] For purposes of Mil. R. Evid. 413, "sexual offense" means an offense punishable under the UCMJ or a crime under federal or state law involving *inter alia* conduct prohibited by *Article 120, UCMJ*; conduct prohibited by *18 U.S.C. § 109A*; contact, without consent, between the accused's genitals and any part of another **[*72]** person's body; or an attempt to engage in the conduct described above. *See* Mil. R. Evid. 413(d)(1), (2), (4), (6).

HN19[↑] In *United States v. Wright, 53 M.J. 476, 482 (C.A.A.F. 2000)*, the CAAF explained that military

[25] However, evidence of sexual offenses charged in the same case may not be used as propensity evidence under Mil. R. Evid. 413. *Hills, 75 M.J. at 356-57*.

judges are required to make three threshold findings before admitting evidence under Mil. R. Evid. 413: (1) the accused is charged with an offense of sexual assault; (2) the evidence proffered is evidence of his commission of another offense of sexual assault; and (3) the evidence is relevant under Mil. R. Evid. 401 and Mil. R. Evid. 402. Additionally, the military judge must apply the balancing test of Mil. R. Evid. 403 to determine whether the probative value of the proffered evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or other countervailing considerations. *Wright, 53 M.J. at 482*. ***HN20***[] In *Wright*, the CAAF set forth a non-exclusive list of factors to be considered under Mil. R. Evid. 403 in the context of Mil. R. Evid. 413 evidence: the strength of the proof of the prior act of sexual assault; the probative weight of the evidence; the potential for less prejudicial evidence; distraction of the factfinder; the time needed for proof of the prior conduct; the temporal proximity of the prior conduct to the charged offense(s); the frequency of the acts; the presence or absence of intervening circumstances between the prior acts and charged offenses; **[*73]** and the relationship between the parties involved. *53 M.J. at 482* (citations omitted). "The importance of a careful balancing arises from the potential for undue prejudice that is inevitably present when dealing with propensity evidence." *United States v. Solomon, 72 M.J. 176, 181 (C.A.A.F. 2013)* (citation omitted). However, the CAAF has stated that "inherent in [Mil. R. Evid.] 413 is a general presumption in favor of admission." *United States v. Berry, 61 M.J. 91, 94-95 (C.A.A.F. 2005)* (citing *Wright, 53 M.J. at 482-83*).

3. Analysis

Appellant contends the military judge abused his discretion by (1) incorrectly concluding that KM's allegations were "in part corroborated" by the McKinney police; (2) misevaluating the strength of proof of the incidents involving KM; (3) concluding the crimes were similar to those charged; and (4) overlooking an intervening circumstance—Appellant's Air Force enlistment. The Government disagrees that the military judge abused his discretion and describes his analysis on the record as "careful and reasoned." Regarding the fourth point—Appellant's enlistment as an intervening circumstance—the Government argues waiver as Appellant did not present this argument to the trial court.

We find the military judge did not abuse his discretion in admitting KM's testimony. The military judge's findings of fact are not clearly erroneous **[*74]** and we adopt them. In his ruling, which was read into the record, the military judge appropriately applied Mil. R. Evid. 413 and *Wright* to find the three initial threshold requirements were met for admissibility of KM's testimony. *See Wright, 53 M.J. at 482*. We briefly describe the three threshold requirements, the first two of which are not in dispute.

During motion practice, trial defense counsel conceded the first two threshold requirements were met and the military judge agreed. First, Appellant was charged with multiple sexual assault offenses in violation of *Article 120, UCMJ*. Second, the proffered evidence showed commission of other sexual offenses under the definition provided in Mil. R. Evid. 413(d). The other sexual offenses included sexual assault and attempted sexual assault of KM on or about 24 and 25 June 2015.

The third threshold requirement is also not seriously in question. The military judge found the evidence involving KM relevant under Mil. R. Evid. 401 and 402, "if for no other purpose, for propensity purposes." ***HN21***[] Relevant evidence is evidence that has any tendency to make the existence of any fact of consequence to determining the case more probable or less probable than it would be without the evidence. Mil. R. Evid. 401. Relevance is a low threshold. *United States v. Roberts, 69 M.J. 23, 27 (C.A.A.F. 2010)*. Viewed **[*75]** in light of Mil. R. Evid. 413's presumption in favor of admission, we find no abuse of discretion. The military judge could reasonably find the evidence that Appellant sexually assaulted and attempted to sexually assault KM had some logical relevance to the charged sexual offenses involving Amn MM and AB EA. *See Berry, 61 M.J. at 95* (citation omitted); *United States v. Bailey, 55 M.J. 38, 40 (C.A.A.F. 2001)*.

The military judge's ruling balanced the probative value of KM's testimony against any countervailing interests under Mil. R. Evid. 403 and he specifically listed the nine factors enumerated in *Wright, 53 M.J. at 482*, prior to ruling. The military judge did not specifically analyze one factor—the "frequency of the acts"—but this does not cause us concern as we conclude this factor also weighed in favor of admitting KM's testimony rather than supporting its exclusion. The military judge found two separate incidents occurred involving KM. Within each event, Appellant's physical and verbal efforts to engage in sexual acts with KM were persistent. Appellant did not argue this factor weighed in favor of exclusion before the trial court or us.

The military judge's ruling also analyzed two of the

Wright factors together: "[d]istraction of the factfinder"[26] and "time needed for proof of the prior act." His ruling found **[*76]** only one witness, KM, would testify and that it would be "difficult to imagine less time needed for proof of this." Appellant does not argue the military judge abused his discretion in his conclusion or by combining the analysis of two factors. We find no abuse of discretion as these two factors were related and particularly so in this military judge alone case.

Appellant's first challenge is to the military judge's assessment of the "strength of the proof." Appellant argues the military judge incorrectly concluded "most glaringly" that KM's allegations were in part corroborated by the McKinney police. We are not persuaded that the military judge's conclusion was clearly erroneous or clearly unreasonable.

The summary report from the McKinney Police Department shows that KM told them that on the first incident at the apartment complex Appellant discarded the condom out of the SUV's window. KM said she knew where the condom was. The summary report explains what happened when one officer drove to the scene:

> Upon arrival I saw a passenger car parked as if dropping someone off at the complex. As I walked up attempting to the find the condom a female walked up to me stating she was [KM]. She **[*77]** stated "I wanted to make sure I told you the right place." [KM] then stated they were in either one of these two parking spaces. The parking spaces were numbered 120 and 121. As I looked in the parking lot I saw a light green in color condom in parking space . . . number 120. I took photos of the area and the condom. Officer [W] collected the condom and later placed it in evidence.

During motion argument, trial defense counsel raised the "lack of corroborating evidence" and noted "we don't have the DNA off of the condom that [KM] led them to." Before us, Appellant renews this argument while also mentioning the lack of integrity of the crime scene. To be clear, the military judge only found this was "the condom allegedly used" by Appellant during the first sexual encounter with KM. He made no conclusive findings of fact that it was the actual condom used.[27]

The word "corroborate" as used by trial defense counsel and the military judge was not defined. ***HN22***[↑] However, in the context of confessions and admissions, "corroborate" means independent evidence that "raises an inference of truth" and "would tend to establish the trustworthiness" of a statement. *See* Mil. R. Evid. 304(c)(1), (4). The military judge described the **[*78]** corroboration as "limited" and "as expected . . . with only two possible witnesses." The limited corroboration was one of three considerations the military judge found "strengthen[ed] the proof of the prior act." The other two considerations had no caveats: that KM reported shortly after the assault and she had no obvious motive to fabricate. We acknowledge there are certainly other possible explanations for the condom that was taken into evidence by the McKinney police. But the military judge's conclusion was only that there was limited corroboration, and this was not clearly erroneous or clearly unreasonable given the evidence that was before the military judge when he ruled.

Appellant further challenges the strength of the proof citing (1) the absence of social media messages between KM and Appellant after KM gave the McKinney police her passwords; (2) the lack of witness interviews who saw Appellant and KM together; (3) the lack of injuries to KM or damage to her clothing; (4) the lack of results of a SAFE that KM underwent; and (5) a lack of evidence from the SUV. We see little conflict between the absence of this evidence and the military judge's conclusion that corroboration **[*79]** was "limited" and find no abuse of discretion.

Appellant next argues, as he did at trial, that he was not interviewed, arrested, or prosecuted. The military judge agreed and entered findings of fact to this effect that we have adopted. In analyzing this fact, the military judge described the absence of an interview as "curious in isolation" but concluded it did not necessarily diminish the strength of proof of KM's allegation. We agree based on the limited evidence that was before the military judge during motion practice. ***HN23***[↑] The strength of proof factor ranges from a high of conviction to a low of gossip. *See* *Wright, 53 M.J. at 482*. KM's report fell between these two extremes. The military judge had very little before him on why the McKinney police took the actions they did. There are no obvious cues from the

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[26] The "distraction of the factfinder" factor is concerned with a danger that "admission of this evidence may result in a distracting mini-trial on a collateral issue." *Berry, 61 M.J. at 97* (citation omitted).

[27] Appellant testified during trial that he discarded the condom in "a little cup" in the back of the SUV. During her testimony, KM was not asked what happened to the condom.

police report that KM's allegations were determined to be false, unfounded, or recanted. To be clear, trial defense counsel argued vehemently that "if you had a 16-year-old girl who would have been raped and you had evidence to corroborate that, something somehow would have been done. And at this point, they didn't even call him." In our view, the military judge had to make an independent determination **[*80]** on strength of proof based on the evidence before him. He did and his conclusions are not clearly erroneous or unreasonable. Other military judges may have been swayed that the absence of a civilian law enforcement interview of Appellant was a direct reflection on the merit of KM's allegations. *HN24*[↑] But an abuse of discretion requires more than a mere difference of opinion. *McElhaney, 54 M.J. at 130*.

Appellant's remaining challenge to the strength of proof is that KM's statements "contain numerous inconsistencies and counterintuitive decisions." At motion practice, Appellant argued inconsistencies including whether the SUV's doors were locked or whether Appellant demanded KM must get in the back seat. The military judge found KM's statements to the McKinney police and to AFOSI "are consistent on many details" but that inconsistencies "do exist." The Defense argued, in their written motion, that KM made a counterintuitive decision by getting in Appellant's SUV the second time. While the military judge did not address this specific argument in his ruling he concluded "[o]n balance, the strength of proof is not so low as to create a substantial risk of unfair prejudice" and that he was "not convinced the allegation **[*81]** is so weak it cannot be fairly considered by a fact-finder." The military judge noted that inconsistencies existed and balanced the strengths and weaknesses of the proof before ruling. We see no abuse of discretion.

Appellant's next challenge is that the charged crimes were not similar to the offenses involving KM. The military judge concluded the offenses were similar because (1) all involved acquaintance versus stranger assaults; (2) all involved force; (3) all involved victims of a similar age to Appellant.[28] Appellant directly challenges the last of the military judge's conclusions that all victims were of a similar age to Appellant. He notes the number of class grades that separated Appellant and KM when they met and contrasts this with AB EA, Amn MM, and Appellant who were all technical school classmates. We are not persuaded by Appellant's direct challenge. The military judge found as fact that KM was 16 years old at the time of the offense and Appellant was 18 years old. The military judge's conclusion that the victims were a similar age to Appellant was not clearly erroneous or unreasonable.[29]

Appellant raises additional grounds for why the offenses were not similar including (1) **[*82]** his relationship with KM was different than Amn MM and AB EA; (2) the incident with KM occurred in a vehicle parked in a public area while the others were in a dormitory room; (3) that KM was a minor and Amn MM and AB EA were adults; (4) only KM's allegations occurred more than once; and (5) only KM alleged a threat. Some of Appellant's listing of differences are obviously true. KM was (1) the only minor; (2) the only one who alleged offenses on two different days; and (3) the only one who was in a parked vehicle with Appellant. However, we need not explore all the differences raised on appeal any more than we need to explore the additional similarities argued by the Government during motion practice or in their answer. Instead, we determine whether it was clearly erroneous for the military judge to find the offenses similar on the grounds he stated despite the differences. We find the military judge's conclusion reasonable and that no abuse of discretion exists. Of particular importance to our review is the second similarity mentioned by the military judge and unchallenged before us, that force was involved in each allegation. We find the manner in which force was reported by each **[*83]** victim to be significantly more important to the determination that the offenses were similar than any of the differences cited

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[28] The transcript reads "[a]s opposed to assaults committed by use of drugs or alcohol or incapacitated victims, all of the offenses involved victims that are of similar age to the accused." It is possible the military judge intended to conclude that alcohol and drugs were not used to facilitate any of the assaults against KM, Amn MM, or AB EA, which made the crimes similar. The Government advances such an argument in the answer before us. Such a conclusion would be accurate from our review of the record; however, we do not rely on that similarity as the military judge did not clearly draw that conclusion.

[29] The military judge did not make findings of fact regarding Amn MM's or AB EA's ages. AB EA's date of birth is listed on a prosecution exhibit and we can see she is a similar age to KM. Both KM and AB EA are less than three years younger than Appellant which is sufficient to be a similar age to him. Amn MM's date of birth is redacted in the record of trial but photographs of her were admitted as prosecution exhibits. Appellant does not assert that Amn MM was not a similar age to Appellant and after reviewing the photographs we see no reason to question the military judge's conclusion that Amn MM was also a similar age to Appellant.

by Appellant.

Appellant's last claim is that the military judge "clearly overlooked" that Appellant enlisted in the Air Force when he assessed whether there were significant intervening circumstances. The Government argues waiver. ***HN25***[] The CAAF has made clear that the Courts of Criminal Appeals have discretion, in the exercise of their authority under *Article 66, UCMJ, 10 U.S.C. § 866*, to determine whether to apply waiver or forfeiture in a particular case, or to pierce waiver or forfeiture in order to correct a legal error. *See, e.g.,* United States v. Hardy, 77 M.J. 438, 442-43 (C.A.A.F. 2018) (quoting United States v. Quiroz, 55 M.J. 334, 338 (C.A.A.F. 2001)); United States v. Chin, 75 M.J. 220, 223 (C.A.A.F. 2016). In this case, we use our discretion and do not apply waiver because we determine there is no legal error to correct. We note that it was the Government's written motion response that first mentioned that Appellant's decision to join the Air Force was a "possible intervening circumstance." The military judge's conclusion was simply that he was "unaware or saw no evidence of any *significant* intervening factors that changed the analysis." (Emphasis added). This conclusion was not an error, clear or otherwise, and certainly was not an **[*84]** abuse of discretion. Appellant did not testify on the motion. There was no evidence before the military judge about how Appellant's completion of basic military training and a portion of technical training significantly changed Appellant, his decision making, or his understanding of the law regarding sexual assault or consent from when he was an adult civilian interacting with KM. Thus, we determine there is no legal error for us to correct regarding this conclusion in the military judge's ruling.

In conclusion, we find the military judge properly admitted KM's testimony, after noting the presumption in favor of admission, and reciting all of the *Wright* factors and analyzing almost all of them. He did not "wholly fail to grapple" with the lack of a full civilian investigation or prosecution. *Cf.* Solomon, 72 M.J. at 181. He considered the inconsistencies and challenges raised to KM's expected testimony and weighed them in determining the probative value and the danger of unfair prejudice. He considered whether there was less prejudicial evidence and noted that KM would testify live and could be confronted with inconsistencies or evidence that was lacking in the McKinney police summary. He found the temporal **[*85]** proximity to be "relatively close" as KM's accusations were about two years before the charged offenses. Considering what the military judge had before him during motion practice, his ruling and his balancing test under the *Wright* factors was not an abuse of discretion.

As it turned out, presentation of the Mil. R. Evid. 413 evidence was not unduly long or distracting. In this military judge alone trial, KM testified once in an open session of the court for 53 pages of the transcript. While the parties asked questions, the military judge had none. In contrast, Amn MM testified slightly longer, totaling 60 pages, and in both open and closed sessions during the findings portion of the trial. Part of Amn MM's testimony was as a rebuttal witness for the prosecution. Amn MM's roommate also testified as witness. AB EA testified for 90 pages in open session during findings. Two witnesses who saw AB EA immediately after she left Appellant's room also testified. In the Defense's case, some photos of Appellant's SUV were admitted during Appellant's testimony. Overall, Appellant testified about the accusations of KM, in open session, in about 25 pages of transcript on direct examination and there was less than **[*86]** 10 pages of cross-examination regarding KM. The military judge asked no questions of Appellant regarding KM. While the accusations involving KM likely occupied more trial time than initially anticipated, a "distracting mini-trial on a collateral matter of low probative value" did not occur which provides some support that the military judge did not clearly err in admitting KM's testimony. *Cf.* Solomon, 72 M.J. at 182.

D. Compel Discovery/Production of Evidence and Witnesses

1. Additional Background

Immediately after the military judge issued his ruling that KM would be permitted to testify as a Mil. R. Evid. 413 witness, he asked the parties whether they had any questions about his ruling or its effect on the case. Civilian defense counsel responded "[i]n light of the court's ruling, we . . . make an oral motion for continuance or at least if we could have a couple of days to try to gather some more evidence in the case." Civilian defense counsel indicated, *inter alia*,

> We don't know about the police case file, what videotapes may exist, what video interviews may exist, whether or not she saw a SANE, forensic nurse examiner, and what statement she might have made to that individual. We don't have that report either. We don't have **[*87]** DNA evidence, and the officers involved in the case at McKinney

will not speak to us without subpoenas.

After more discussion, the oral motion for continuance expanded into an oral motion to compel discovery under R.C.M. 701 and production under R.C.M. 703, including telephonic witness testimony. The Defense asserted it could not effectively represent Appellant and would be "simply unprepared" to address anything KM testified to because "we have no check and we have no additional information as to what exists out there regarding this allegation. We would essentially be flying blind with regard to anything she says." The military judge addressed the timeliness of the motion, which we describe in detail below, before he recessed the court and ordered the Defense to produce a written motion before court reconvened in six hours. The Defense's written motion to compel and for a continuance was filed. It included, as attachments, the discovery requests that had been filed. The Defense called no witnesses to support the motion. The Government provided several documents to show what discovery it had provided to the Defense and both sides presented argument. The military judge denied the motion and later in the **[*88]** trial, after KM testified on findings, provided his essential findings of fact and conclusions of law. Neither side requested the military judge reconsider his ruling after KM testified.

Before us, Appellant raises various challenges to the military judge's ruling. In his assignments of error brief, Appellant initially claimed the military judge did not provide any rationale for his ruling and argued that we should accordingly afford his ruling less deference. While Appellant is correct that the military judge did not announce his findings of fact and conclusions of law at the same point that he ruled, we agree with the Government that the military judge made essential findings of fact and conclusions of law and the appropriate standard of review is an abuse of discretion.

2. Law

HN26[↑] In reviewing discovery matters, we conduct a two-step analysis: "first, we determine whether the information or evidence at issue was subject to disclosure or discovery; second, if there was nondisclosure of such information, we test the effect of that nondisclosure on [Appellant's] trial." *United States v. Coleman, 72 M.J. 184, 187 (C.A.A.F. 2013)* (quoting *United States v. Roberts, 59 M.J. 323, 325 (C.A.A.F. 2004))*. We review a military judge's decision on a request for discovery for an abuse of discretion. *Roberts, 59 M.J. at 326* (citation omitted). **[*89]**

HN27[↑] "[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963)*. The United States Supreme Court has extended *Brady*, clarifying "that the duty to disclose such evidence is applicable even though there has been no request by the accused" and includes "impeachment evidence as well as exculpatory evidence." *Strickler v. Greene, 527 U.S. 263, 280, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999)* (citation omitted); *see United States v. Claxton, 76 M.J. 356, 359 (C.A.A.F. 2017)* (quoting *Strickler, 527 U.S. at 280*). "A military accused also has the right to obtain favorable evidence under *Article 46, UCMJ[, 10 U.S.C. § 846]* . . . as implemented by R.C.M. 701-703." *Coleman, 72 M.J. at 186-87* (footnote omitted). Accordingly, *Article 46, UCMJ*, and these implementing rules provide a military accused statutory discovery rights that are greater than those afforded by the Constitution. *See id. at 187* (citations omitted); *Roberts, 59 M.J. at 327*. In particular, R.C.M. 701(a)(2)(A) requires the Government, upon defense request, to permit the inspection of, *inter alia*, any documents "within the possession, custody, or control of military authorities, and which are material to the preparation of the defense . . . ."

HN28[↑] "Trial counsel must exercise due diligence in discovering [favorable evidence] not only **[*90]** in his possession but also in the possession . . . of other 'military authorities' and make them available for inspection." *United States v. Jackson, 59 M.J. 330, 334 (C.A.A.F. 2004)* (alterations in original) (quoting *United States v. Simmons, 38 M.J. 376, 381 (C.M.A. 1993))*. "[T]he parameters of the review that must be undertaken outside the prosecutor's own files will depend in any particular case on the relationship of the other governmental entity to the prosecution and the nature of the defense discovery request." *United States v. Williams, 50 M.J. 436, 441 (C.A.A.F. 1999)*. The scope of this due-diligence requirement generally is limited to (1) the files of law enforcement authorities that have participated in the investigation of the subject matter of the charged offenses; (2) investigative files in a related case maintained by an entity closely aligned with the prosecution; and (3) other files, as designated in a defense discovery request, that involved a specific type of information within a specified entity. *Id.* (internal quotation marks and citations omitted).

HN29[] The CAAF has generally agreed with "the proposition that an object held by a state law enforcement agency is ordinarily not in the possession, custody, or control of military authorities." United States v. Stellato, 74 M.J. 473, 484 (C.A.A.F. 2015) (citation omitted). "However, a trial counsel cannot avoid R.C.M. 701(a)(2) through the simple expedient of leaving **[*91]** relevant evidence to repose in the hands of another agency while utilizing his access to it in preparing his case for trial." *Id.* (internal quotation marks and citations omitted). The CAAF in *Stellato* identified a number of scenarios from Article III[30] courts where evidence not in the physical possession of the prosecution team is still within the possession, custody, or control of military authorities. HN30[] These include when: (1) the prosecution has both knowledge and access to the object; (2) the prosecution has the legal right to obtain the evidence;[31] (3) the evidence resides in another agency but was part of a joint investigation; and (4) the prosecution inherits a case from a local sheriff's office and the object remains in the possession of the local law enforcement. *Id.* (footnotes omitted). Additionally, pursuant to the provisions of R.C.M. 701(a)(6), "a trial counsel cannot avoid discovery obligations by remaining willfully ignorant of evidence that reasonably tends to be exculpatory, even if that evidence is in the hands of a Government witness." Id. at 487.

HN31[] Where the defense specifically requests discoverable information that is erroneously withheld, the error is tested for harmlessness beyond a reasonable **[*92]** doubt. Coleman, 72 M.J. at 187 (citations omitted). "Failing to disclose requested material favorable to the defense is not harmless beyond a reasonable doubt if the undisclosed evidence might have affected the outcome of the trial." *Id.* (citation omitted). "Inadvertent nondisclosure has the same impact on the fairness of the proceedings as deliberate concealment." Strickler, 527 U.S. at 288. However, "[m]ere speculation that some exculpatory material may have been withheld is unlikely to establish good cause for a discovery request on collateral review," id. at 286, "[n]or . . . should such suspicion suffice to impose a duty on [defense] counsel to advance a claim for which they have no evidentiary support." *Id.*

HN32[] In addition to the discovery rights described above, R.C.M. 703 provides "[e]ach party is entitled to the production of evidence which is relevant and necessary." R.C.M. 703(f)(1); United States v. Rodriguez, 60 M.J. 239, 246 (C.A.A.F. 2004). Evidence is relevant if "it has any tendency to make a fact more or less probable than it would be without the evidence" and "is of consequence in determining the action." Mil. R. Evid. 401. "Relevant evidence is 'necessary when it is not cumulative and when it would contribute to a party's presentation of the case in some positive way on a matter in issue.'" Rodriguez, 60 M.J. at 246 (quoting R.C.M. 703(f)(1), Discussion). The moving **[*93]** party is required, as a threshold matter, "to show the requested material existed." *Id.*

HN33[] In addition to production of evidence, "counsel for the accused . . . shall have an equal opportunity to obtain witnesses . . . in accordance with such regulations as the President may prescribe." Article 46, UCMJ, 10 U.S.C. § 846. "The defense shall submit to the trial counsel a written list of witnesses whose production by the Government the defense requests." R.C.M. 703(c)(1). "A list of witnesses whose testimony the defense considers relevant and necessary on the merits or on an interlocutory question shall include the name, telephone number, if known, and address or location . . . and a synopsis of the expected testimony sufficient to show its relevance and necessity." R.C.M. 703(c)(2)(B). "The military judge may set a specific date by which such lists must be submitted." R.C.M. 703(c)(2)(C). "Failure to submit the name of a witness in a timely manner shall permit denial of a motion for production of the witness, but relief from such denial may be granted for good cause shown." *Id.*

HN34[] "A military judge's ruling on a request for a witness is reviewed for an abuse of discretion." McElhaney, 54 M.J. at 126 (citation omitted). "We will not set aside a judicial denial of a witness request unless **[*94]** we have a definite and firm conviction that the trial court committed a clear error of judgment in the conclusion it reached upon a weighing of relevant factors." *Id.* (internal quotation marks and citation omitted).

> Factors to be weighed to determine whether personal production of a witness is necessary include: the issues involved in the case and the importance of the requested witness to those issues; whether the witness is desired on the merits

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[30] U.S. CONST. art. III.

[31] *See* United States v. Stein, 488 F. Supp. 2d. 350, 362-63 (S.D.N.Y. 2007) (finding a deferred plea agreement with a corporation and the Government's admission that it had the unqualified right to demand production of evidence from the corporation gave the Government the legal right to obtain documents subject to one "limited privilege carve-out" in the deferred plea agreement).

> . . . ; whether the witness's testimony would be merely cumulative; and the availability of alternatives to the personal appearance of the witness. Timeliness of the request may also be a consideration when determining whether production of a witness is necessary.

Id. at 127 (citations omitted).

3. Analysis

The timeliness of trial defense counsel's motion was addressed by the trial court. The military judge considered the filing untimely and seriously considered denying the motion on this ground. Instead, the military judge considered the merits of the motion at the request of the trial counsel. We agree the motion was untimely filed. Two scheduling order deadlines passed without a defense motion to compel any discovery or to produce any evidence or witness. **[*95]** While trial defense counsel made a feeble attempt to argue good cause existed for the untimely filing, the military judge, under his R.C.M. 701(g)(1) authority, had long before specified the timing of discovery and had imposed terms and conditions on when motions to compel were due. The late filing did not give the Government an opportunity to prepare a written response, though evidence and argument were presented. Regarding the merits, we adopt the military judge's essential findings as they are not clearly erroneous. We find no abuse of discretion as (1) the Defense did not show some of the evidence existed under *Strickler, 527 U.S. at 286*; (2) the evidence that did exist, at least at one time,[32] was not in the possession, custody, or control of military authorities; (3) the Defense failed to show, at trial, how the evidence tended to be exculpatory; and (4) the Defense failed to comply with the procedures required for production and did not demonstrate the necessity of the evidence and witnesses it requested be produced.

***a. Did the Requested Evidence Exist*?**

The military judge's ruling addressed five pieces of evidence: (1) a SAFE report on KM; (2) written or video recordings of KM's interviews; (3) photographs related to **[*96]** KM's investigation; (4) physical evidence gathered in KM's investigation; and (5) DNA results from the processing of the evidence collected during KM's SAFE. We begin by noting the Defense failed to carry its initial burden that some of the evidence ever existed such that it could be discovered or produced. Specifically, for item (2) above we see no indication in the record of trial that any of KM's interviews were recorded or transcribed. The Defense did not call KM or her parents to testify on the motion that the interviews were recorded or transcribed. The Defense offered no evidence regarding the practices and procedures of the McKinney Police Department on recording or transcribing victim interviews of minors. Similarly, we also see no indication that KM made a written statement to the McKinney police[33] or that additional written notes were taken beyond the summary provided to the Defense. The Defense failed, as a threshold matter, to show that written or video recordings of KM's interviews existed. *See Rodriguez, 60 M.J. at 246*. Therefore, we find no abuse of discretion when the military judge denied this portion of the motion.

The Defense had good reason to believe the remaining items existed, at least **[*97]** at one time. For KM's SAFE report, the police summary showed $528.00 was paid to Texas Health South for a SAFE and KM told the AFOSI agents she underwent the examination. It was a reasonable inference that a SAFE report would have been written and that it would have contained KM's narrative of what occurred as such statements generally guide a SANE during an examination. Similarly, for photographs, the police summary shows that photos were taken of a condom before it was taken into evidence and those photos were saved on a CD. Additionally, during her trial testimony KM indicated that photos were taken of her during her SAFE. As far as physical evidence, the AFOSI summary indicated that KM said her clothes were taken during the SAFE, and the condom seized from the parking lot was listed as evidence. We evaluate the military judge's ruling on this evidence below.

The questions of whether DNA results existed and tended to be exculpatory are more complex. The AFOSI summary of KM's interview included "[Appellant's] DNA was found on her clothes and on the swabs inside the kit." There are legitimate reasons to question the accuracy of this statement. First, the McKinney police

[32] Appellant does not assert that the Government failed to meet its affirmative obligation to preserve evidence. *See Stellato, 74 M.J. at 483*.

[33] According to AFOSI's summary of KM's interview, she declined to make a written statement to AFOSI. An AFOSI agent took notes of KM's interview, which were provided to the Defense.

summary does **[*98]** not say that a DNA sample from Appellant was ever obtained by any method. Second, the police summary says nothing about forensic testing of any portion of KM's SAFE kit and does not even list the contents of the kit. Third, the police summary says nothing about the condom being submitted for DNA or any other forensic testing. Fourth, the military judge found as fact that Appellant "was never interviewed, charged, or prosecuted" and this finding is not clearly erroneous. As there are good reasons to question whether DNA testing was even conducted, we look elsewhere in the record of trial for support for or against the existence of DNA results.

A review of Appellant's trial testimony raises further questions about whether exculpatory DNA results existed. During his testimony, Appellant denied knowing that KM had "made, or tried to make, a criminal complaint" against him. Appellant further testified that he first learned of KM's criminal complaint when he was interviewed by AFOSI. He testified "I was never informed" that he had "no idea" and the matter "was brand-new" and "shocking" to him.[34] If Appellant's testimony is taken at face value, it seems unlikely that a DNA sample was knowingly **[*99]** obtained from him during a subject SAFE as it would be obvious that the McKinney Police Department was investigating KM's complaints. On the other hand, Appellant was never asked whether he provided a DNA sample.

During KM's trial testimony, the military judge permitted KM to answer a question about DNA testing before he ruled on a trial counsel objection to its admissibility. KM testified "I cannot 100% say what they found" and "I never spoke directly with the hospital or any of the investigators about what they found through my rape kit. I only heard through other—like through my parents what they found."[35] As KM's parents never testified at trial, we have no confirmation or denial from them as to their knowledge of DNA testing or results.

Before us, Appellant asserts that KM lied to AFOSI about the DNA results and "all parties knew this must be false because the McKinney Police Department never interviewed [Appellant] or obtained his DNA" so "any associated DNA would have shown that [Appellant] was not a match." We find Appellant's argument flawed. Either DNA results exist or they do not, and it is Appellant's burden to show they exist. We cannot reconcile the assertion that the McKinney **[*100]** police did not obtain Appellant's DNA yet somehow an unnamed forensic laboratory was able to produce exculpatory results showing Appellant was not a match. Elsewhere in this record of trial is the testimony of a forensic biologist and it is clear to us that a DNA sample from Appellant would be necessary for DNA comparison testing. We note that Appellant has not requested we order a *Dubay*[36] hearing to determine additional facts and we find the development of additional facts unnecessary to resolve this assignment of error considering Appellant's initial burden on the motion.

Based on the record of trial before us, there is insufficient evidence that if DNA testing results existed that they also tended to be exculpatory. KM did not say the DNA results excluded Appellant. No one has asserted that except Appellant in his brief. The Defense had ample opportunity at the trial court and on appeal to investigate whether DNA testing was conducted. It is possible that KM was merely mistaken when she told AFOSI about the DNA results; after all, she apparently only received information about DNA results through her parents. The Defense did not attempt to call KM or her parents to testify to support **[*101]** its motion. KM's mother's name is specifically listed on the McKinney police summary and both parents' names are in the AFOSI agent's notes. There is no evidence that KM's parents were unwilling to share with the Defense what they recalled of KM's investigation. The Defense did not show, at trial or thereafter, that exculpatory DNA testing results involving KM and Appellant exist. We find no abuse of discretion when the military judge denied requests to compel or produce DNA results.

b. Possession, Custody, or Control of Military Authorities

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[34] On cross-examination, Appellant admitted that he received a phone call from someone who identified themselves as a part of the McKinney Police Department who said if Appellant went and saw KM again he would be arrested. Appellant testified the individual did not give a name or badge number and did not ask him to come to the police station. At trial, Appellant expressed doubt that the caller was part of the McKinney Police Department. Regardless, this phone call sheds no light on whether a DNA sample was obtained for comparison testing.

[35] After KM provided this answer the military judge asked civilian defense counsel, "[A]ny theory on why I can consider that?" Civilian defense counsel replied, "No sir. We'll move on."

[36] *United States v. DuBay, 17 C.M.A. 147, 37 C.M.R. 411 (C.M.A. 1967)*.

The remaining evidence, which it is reasonable to conclude actually existed, at least at one time, includes the (1) SAFE report on KM; (2) photographs related to KM's investigation; and (3) physical evidence gathered in KM's investigation, including the condom seized at the parking lot. We find no abuse of discretion when the military judge concluded this evidence was not in the possession, custody, or control of military authorities.

There is no question that the AFOSI and Prosecution did not participate in the McKinney police investigation that occurred long before Appellant enlisted in the Air Force. Additionally, the McKinney police were not closely **[*102]** aligned with the Prosecution. The military judge made similar conclusions that initially AFOSI "was denied access to any evidence regarding the investigations as a result of Texas state law provisions" and "[e]ventually, [AFOSI] was able to obtain" the summary of the investigation.

Appellant argues the AFOSI's initial request for information about the McKinney police investigation was defective because it did not identify that the information was requested for a criminal justice purpose. We disagree. A concern about AFOSI's request was noted in a written legal opinion from the Texas Attorney General's Office back to counsel for the City of McKinney, although it only related to a three-page document, labeled "Exhibit B," which is in the record of trial and was released to the Defense. Additionally, the opinion of the Texas Attorney General's Office says

> if the city determines the requestor intends to use the [criminal history record information] for a criminal justice purpose and for purposes consistent with the [Texas] Family Code, then the city must release the submitted information that shows the type of allegation made and whether there was an arrest, information, indictment, detention, **[*103]** conviction, or other formal charges and their disposition.

"Exhibit B" only confirms that a condom and CD of photographs were taken into evidence, matters already known from the police summary. All "Exhibit B" adds was that the McKinney police knew who Appellant was, his identifying information, and some identifying information about KM. We find little support for Appellant's claims that a defective AFOSI request "may have proved fatal" to the Government's request for information.

Appellant also claims that there was close alignment because the McKinney police "provided the Government with exclusive access to its officers." We disagree with Appellant's characterization of the access the Government had to the McKinney police. The military judge during the motion argument asked the senior trial counsel what efforts were taken to find out why Appellant was not prosecuted for offenses involving KM. The senior trial counsel replied, "We did call some of the officers who worked on the case who all told us that they didn't remember the case." As stated above, the Defense had also made contact with at least one of the McKinney police officers but was told "they will not discuss any aspect of **[*104]** the case without a subpoena from the [G]overnment." We do not see a meaningful difference in access when it appears all the Government learned from their contact was the officers had no memory of Appellant's case. There is no claim by Appellant that the Prosecution learned (1) why Appellant was not interviewed, charged, or prosecuted; (2) whether KM made inconsistent statements to the officers; (3) whether they had a copy of KM's SAFE report or kit; or (4) whether they had sent evidence collected to a forensic laboratory for DNA or other testing. In our view, the parties had equal, albeit limited, access to the McKinney police investigation and those who conducted it.

HN35[↑] We recognize that "an object held by a state law enforcement agency is ordinarily not in the possession, custody, or control of military authorities" but "a trial counsel cannot avoid R.C.M. 701(a)(2) through the simple expedient of leaving relevant evidence to repose in the hands of another agency while utilizing his access to it in preparing for trial." *Stellato, 74 M.J. at 484* (internal quotation marks and citations omitted). We see nothing in the record of trial to show that the trial counsel had access to KM's SAFE report, the condom, the CD of photographs, **[*105]** or any purported forensic testing results. Without having access to these materials, the trial counsel could not use them to prepare for trial. The record of trial before us shows the trial counsel had the same access as the defense counsel to these objects—none. Three of the four factors in *Stellato* require no further analysis as we see no access to the objects at any point, no joint investigation, and the prior criminal case from the McKinney police was not inherited by the Prosecution. This leaves only the second factor: "whether the prosecution has the legal right to obtain the evidence." *Id.*

At first blush, the second factor's language seems to indicate that the Government had a "legal right to the evidence" because it could subpoena a witness or

witnesses to show up at trial and bring the condom, the CD of photographs, the SAFE report and related evidence, or any forensic testing results and therefore this evidence was within the "control" of the Government. However, such an interpretation is overly broad and would lead to all evidence subject to compulsory process to be within the Government's "control" regardless of where it was held and by whom. A legal "process" to obtain **[*106]** evidence, like a subpoena, is not the same thing as a legal "right" to such evidence. The district court case cited by the CAAF regarding the "legal right to the evidence" had a deferred prosecution agreement (DPA) which gave the United States the "legal right to obtain evidence." *See* Stein, 488 F. Supp. 2d at 363 ("the DPA gives the government the legal right to obtain these documents subject to the limited carve-out"); Stellato, 74 M.J. at 492 (Stucky, C.J., concurring) (addressing that *Stein* concerned the legal right of the Government to obtain materials from an accused based on a DPA). In our view, the district court in Stein was not just referencing the availability of subpoena power when it described the legal right to obtain evidence. In Appellant's case, there was no deferred prosecution agreement and the trial counsel had no specified legal right to obtain the evidence from the McKinney police as they were wholly uninvolved in the investigation. The military had no jurisdiction to prosecute the offenses involving KM and it remained a local law enforcement matter even if evidence related to it was later found to be admissible as propensity evidence under Mil. R. Evid. 413. The military judge cited *Stellato* in his ruling and distinguished it. **[*107]** We find no abuse of discretion as the military judge's conclusion that the evidence was not in the possession, custody, or control of military authorities was not clearly unreasonable or erroneous.

c. Production of Evidence and Witnesses

Appellant raises several claims regarding the production of the evidence and witnesses beyond what has been described above. First, Appellant claims the military judge "should have rectified" an Article 46, UCMJ, "unlawful inequity by ordering the Government to produce the witnesses for trial or pretrial interviews." This argument fails here for the same reasoning we described above. We see no Article 46, UCMJ, inequity that should have been corrected by the military judge as the parties' access to the McKinney police was substantially the same. Regarding pretrial interviews, the military judge rejected a request to order pretrial interviews noting "no party is entitled to compulsory pretrial interviews"—a conclusion that is not clearly erroneous or unreasonable. *See* United States v. Alston, 33 M.J. 370, 373 (C.M.A. 1991). Additionally, we see no efforts by trial counsel that attempted to impede the Defense's access to evidence or witnesses.

Second, Appellant claims the Government should have subpoenaed the **[*108]** requested information, citing Tex. Gov't Code Ann. § 552.0055 that a subpoena duces tecum issued in compliance with a rule of criminal procedure is not a "request for information" like AFOSI's initial request. We need not delve into Texas statutes cited by the parties as Appellant fails to account for the responsibilities of the Defense prior to receiving the "benefit of compulsory process" under R.C.M. 703(a). Notably, in their written motion, Appellant conceded that he did not "specifically request the non-witness evidentiary items listed in this motion to compel" until the day of the written motion. The motion, dated 18 September 2018, was filed near the end of the second day of trial. It is clear to us that Appellant did not request the trial counsel to subpoena any evidence regarding KM's allegations prior to trial despite having knowledge that the Government sought to admit KM's testimony and the Defense had moved to exclude it. Further, according to R.C.M. 703(f)(3), Appellant "shall list the items of evidence to be produced and shall include a description of each item sufficient to show its relevance and necessity, a statement where it can be obtained, and if known, the name, address, and telephone number of the custodian of the evidence." **[*109]** Even after receiving six hours to compose a written motion, the Defense did not include this information and instead requested an additional two-day continuance to "gather subpoenas for the listed witnesses and the other evidence listed." We find no abuse of discretion when the military judge determined the Defense failed to articulate a basis for "relevance and necessity" under R.C.M. 703(f)(1) and (3) and denied their request to produce evidence via subpoena.

Appellant also claims his Sixth Amendment right to confront KM was impacted by the military judge's ruling and the need to challenge KM's credibility, trustworthiness, and reliability were sufficient to show evidence and witnesses were relevant and necessary under R.C.M. 703(f)(3). We are not persuaded. Appellant has not shown, at trial or before us, what additional cross-examination questions would have been asked of KM had additional evidence or witnesses been produced. Application of R.C.M. 703 did not deny Appellant the right to compulsory process and relevant witnesses under the Sixth Amendment but "simply

allow[ed] for judicial review of denial of subpoenas on relevance and materiality grounds before they are enforced by court order." *See* United States v. Breeding, 44 M.J. 345, 355 (C.A.A.F. 1996) (Sullivan, J., concurring in the result).

Regarding the **[*110]** requested witnesses, the military judge found the Defense's request for production "to be nothing more than a list of every investigator" of KM's allegations. The military judge referenced the need for a synopsis of testimony under this rule and that "[n]o such synopsis has been provided." We have weighed the factors from *McElhaney* including the timeliness of the request and that the witnesses were for the merits to address a challenge to the credibility and reliability of a Mil. R. Evid. 413 witness. *See* 54 M.J. at 127. We also considered the absence of any summary of their proposed testimony before the trial court or us. We see no clear error of judgment by the military judge as he cited the relevant factors and *McElhaney* prior to denying the request to produce witnesses.

d. Did the Evidence Tend to Be Exculpatory?

The military judge concluded the Defense had "failed to show how any of the requested evidence is actually exculpatory" and that a presumption that the evidence would be exculpatory is not the standard. The military judge determined "nothing in the summary of the investigation or in the multiple interviews of [KM] . . . demonstrated the evidence sought by [the] [D]efense would be exculpatory. ***HN36***[↑] This [c]ourt **[*111]** will not presume or guess that evidence is exculpatory." Before us, Appellant argues the military judge was incorrect when he concluded there was "nothing" exculpatory and again refers to KM's statement regarding DNA being found on her clothes and on the swabs in her SAFE kit. Appellant argues this evidence "clearly was exculpatory" and "would have negated or reduced [Appellant's] degree of guilt with respect to [KM]'s allegations."

HN37[↑] As a threshold matter, we note that R.C.M. 701(a)(6) addresses favorable evidence that would negate or reduce the degree of guilt to a charged offense or reduce the punishment. So, to the extent Appellant referenced a concern about a "degree of guilt" with KM's allegations, his concern is misplaced as he was not ever charged with committing an offense against KM so no degree of guilt regarding KM is involved in the inquiry. Still, we conclude that impeachment evidence related to KM, as a Mil. R. Evid. 413 propensity witness, would be material to Appellant's guilt or the punishment of the charged offenses under *Brady, Strickler*, and *Claxton. See* 373 U.S. at 87; 527 U.S. at 280; 76 M.J. at 359.

But Appellant has provided us little more than speculation regarding the impeachment evidence regarding KM that was withheld from him but was **[*112]** known to the trial counsel or other Air Force lawyers who advised on Appellant's investigation and prosecution. ***HN38***[↑] As the United States Court of Military Appeals once observed, "[g]enerally, the production of [*Brady*] evidence is required and reversal mandated where, after trial, such information is discovered which was known to the prosecution but which was unknown to the defense." United States v. Lucas, 5 M.J. 167, 171 (C.M.A. 1978). Appellant references KM's statements to AFOSI regarding DNA being found and those statements being wrong. But the Defense was permitted to ask cross-examination questions of KM regarding why she said her DNA was found and to offer a theory of admissibility once she testified. Once KM testified that she was not 100% sure what was found and that she only heard about results through her parents and not through investigators or hospital staff, the civilian defense counsel agreed to move on rather than propose a theory of admissibility. Even if this cross-examination had been admitted, we see it adding little to KM's impeachment. KM was extensively challenged on her lack of memory, inconsistencies, the physical positions of her and Appellant, and that she never went to court in Texas to testify against Appellant. **[*113]** Additionally, the Defense's closing argument addressed the absence of the SAFE report, that the McKinney police did not interview Appellant, and he was not prosecuted. The Defense argued these showed "something in those items of evidence that kills her story" or "proves that it was consensual." Appellant makes similar broad pronouncements before us.

Regarding the SAFE report, we acknowledge that we often see prior inconsistent statements in the narrative provided by a victim which differs from statements made to law enforcement, to lawyers in pretrial interviews, and in trial testimony. But Appellant did not call KM to testify on the motion and did not show what she said during her SAFE which could then be compared to what she told the McKinney police, the AFOSI, or the defense team during their pretrial interview of her. The Defense did not present evidence that KM remembered the SANE taking notes or typing verbatim what KM said. The Defense did not present any form that the hospital

used to show that a narrative would have been obtained. Finally, the Defense did not present evidence of inconsistent statements to KM's best friend, whom she first reported to and whose name was in the **[*114]** AFOSI's summary, to show that it was more likely that inconsistent statements were made to the SANE.

Our standard of review is not whether other military judges would have ordered the Government to obtain the SAFE report or even whether it is possible that the SAFE report may contain prior inconsistent statements. Instead, it is whether the military judge abused his discretion when he concluded the Defense had failed to show how any of the requested evidence was exculpatory. We find no abuse of discretion under the circumstances of this case. We see no "recklessly cavalier approach to discovery" from the trial counsel that resulted in a "critical failure[ ] to produce exculpatory evidence." *Stellato, 74 M.J. at 482* (footnote omitted). We see no systematic ignoring of R.C.M. 701 discovery obligations. During the six-hour delay in the case while the Defense wrote its motion to compel, the senior trial counsel attempted to reach out to the District Attorney's Office as another avenue to seek information. With only limited time allotted the senior trial counsel did not hear back before argument on the motion and did not state later in the trial whether the District Attorney's Office ever called back. Appellant does not **[*115]** claim the senior trial counsel learned of evidence from the District Attorney's Office that tended to be exculpatory. Unlike many cases, where the prosecution works closely with a local police department, this case shows an utter lack of a relationship between the trial counsel and the entity which, at least at one time, held additional evidence regarding KM's allegations against Appellant. *See Williams, 50 M.J. at 441*.

Finally, we note that there has not been a claim that KM had any of the evidence, like a copy of the SAFE report or a copy of the CD of photographs. Therefore, we see no willful ignorance by the trial counsel of evidence that reasonably tends to be exculpatory in the hands of KM. *See Stellato, 74 M.J. at 487* (citations omitted). Like the military judge, we see the circumstances of this case to be vastly different than *Stellato* and we conclude there was no abuse of discretion by the military judge in denying the defense motion. As we determined the evidence and witnesses at issue were not subject to disclosure, discovery, or production, we do not reach the second question and test the effect of nondisclosure or a failure to produce a witness on Appellant's trial. *See Coleman, 72 M.J. at 187*.

E. Mil. R. Evid. 412

1. Additional Background

After Appellant was **[*116]** permitted to withdraw his plea to battery of Amn MM, the defense counsel orally moved for a continuance citing a need to obtain evidence of Amn MM's sexual practices with other men that the Defense argued would be admissible under Mil. R. Evid. 412. The Defense cited its earlier Mil. R. Evid. 412 motion and provided an additional email from one male Airman who would testify that his sexual experiences with Amn MM included biting, choking, and scratching.[37] Appellant testified in a closed session that he learned this information from the other male Airman about a week and a half before the charged incident where he slapped Amn MM in the face. Appellant also testified that he thought Amn MM might enjoy being slapped in the face "because of the previous stuff I've heard before" and because of his previous sexual history with Amn MM.

The military judge ruled the testimony of other Airmen was not constitutionally required under Mil. R. Evid. 412(b)(3) and excluded it. As described in the legal and factual sufficiency section, the military judge had already admitted evidence of the nature of prior sexual encounters between Appellant and Amn MM. *See* Mil. R. Evid. 412(b)(2). The military judge permitted Appellant to testify that Amn MM asked him to smack her in the face **[*117]** and for the Defense to cross-examine Amn MM on this point. The military judge denied the continuance request.

After the ruling, Appellant testified that Amn MM asked him to slap her before and he did so in a prior sexual encounter. He also testified that he thought slapping was "something she was into." Upon recall, Amn MM testified, as we described above, that she told Appellant before that her face was off-limits.

On appeal, Appellant asserts an abuse of discretion because the military judge erroneously determined that the evidence was "marginally relevant" and that there

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[37] The trial transcript, appellate exhibits, and briefs addressing this excluded evidence were sealed pursuant to R.C.M. 1103A. These portions of the record and briefs remain sealed, and any discussion of sealed material in this opinion is limited to that which is necessary for our analysis. *See* R.C.M. 1103A(b)(4).

were disparities between the sexual acts of the other male Airman and Appellant with Amn MM. Appellant advances a theory that Amn MM's "unusual and distinctive" sexual pattern supported Appellant's testimony that Amn MM asked him to slap her in the face before and his belief that she "would enjoy a strike to the face." The Government responds that there was no error, and if there was error, it was harmless beyond a reasonable doubt. We disagree with Appellant and find no abuse of discretion.

2. Law

HN39[] "We review a military judge's decision to admit or exclude evidence for an abuse of discretion." *Erikson, 76 M.J. at 234* (citation omitted). The **[*118]** application of Mil. R. Evid. 412 to proffered evidence is a legal issue that appellate courts review de novo. *United States v. Roberts, 69 M.J. 23, 27 (C.A.A.F. 2010)* (citation omitted).

HN40[] Mil. R. Evid. 412 provides that, in any proceeding involving an alleged sexual offense, evidence offered to prove the alleged victim engaged in other sexual behavior or has a sexual predisposition is generally inadmissible, with three limited exceptions, the third of which is pertinent to this case. The burden is on the defense to overcome the general rule of exclusion by demonstrating an exception applies. *United States v. Carter, 47 M.J. 395, 396 (C.A.A.F. 1998)* (citation omitted).

HN41[] The third exception under Mil. R. Evid. 412 provides that the evidence is admissible if its exclusion "would violate the constitutional rights of the accused." Mil. R. Evid. 412(b)(1)(C). Generally, evidence of other sexual behavior by an alleged victim "must be admitted within the ambit of [Mil. R. Evid.] 412(b)(1)(C) when [it] is relevant, material, and the probative value of the evidence outweighs the dangers of unfair prejudice." *United States v. Ellerbrock, 70 M.J. 314, 318 (C.A.A.F. 2011)* (citation omitted).

3. Analysis

In his ruling, the military judge cited appropriate caselaw and made findings of fact. Only his ultimate conclusions are challenged on appeal. The military judge concluded the testimony of the other Airman was "marginally relevant." The military judge determined that "[t]he **[*119]** acts described are different, both in timing and in form from what is alleged that [Appellant] did in this case [to Amn MM]" and "[b]iting, choking, and scratching during sex are different than a smack to the face as a method of arousal." None of these conclusions are an abuse of discretion.

HN42[] Relevance is a "low threshold." *Roberts, 69 M.J. at 27*. Evidence is relevant if it has any tendency to make the existence of a fact more probable or less probable than it would be without the evidence. Mil. R. Evid. 401(a). Trial defense counsel argued Amn MM had a "crenulation towards rough sex" that would make Appellant's mistake of fact defense stronger given that Amn MM mumbled something before Appellant struck her. The evidence met the low relevance threshold as it did have a tendency to show that Appellant may have had an honest mistake of fact and the other Airman's comments may have been a source that contributed to it.

HN43[] Materiality is a "multi-factored" test looking at the importance of the issue for which the evidence was offered in relation to the other issues in the case; the extent to which the issue is in dispute; and the nature of the evidence. *Ellerbrock, 70 M.J. at 318*. The other Airman's testimony lacked materiality based on the nature of the testimony. **[*120]** The other Airman was not going to testify that Amn MM's prior sexual practices included being slapped in the face, only that different sexual practices such as biting, choking, and scratching had occurred. Further, there was no indication that the other Airman would support Appellant's claims that he had slapped Amn MM before during sex and that Amn MM said "strike me" during the charged incident. Additionally, the proposed testimony did not contribute in any positive way to whether the belief that Appellant may have held was reasonable under the circumstances. It may have done the opposite as a reasonable person would not rely upon a report from another person to determine consent.

Further, as the military judge noted, there was already testimony before the court of the past sexual practices of Amn MM and Appellant which were more material. The military judge broadly described this evidence as "Amn MM enjoys or participates in aggressive sex" before stating that this conclusion was the only thing that the other Airman's testimony could offer.

HN44[] Even if the evidence is relevant and material, it must be admitted only when Appellant can show that the probative value outweighs the dangers **[*121]** of unfair prejudice. *See* Mil. R. Evid. 412(c)(3). Those

dangers include *inter alia* harassment or interrogation that is repetitive or only marginally relevant. *Ellerbrock, 70 M.J. at 318* (citation omitted). The military judge's ruling concluded that the evidence added little to what was before the court, an indication of how repetitive it was. We agree that the Airman's testimony would have been cumulative and added very little to the Defense's case. For the most part, Amn MM did not dispute the prior sexual practices she had engaged in with Appellant. The only serious dispute was whether slapping in the face was part of those prior practices or was expressly forbidden. The other Airman's testimony did not assist on this disputed matter. We conclude this other Airman's testimony, while relevant, lacked materiality and Appellant did not show that its probative value outweighed the dangers of unfair prejudice because the evidence was harassing to Amn MM, repetitive of evidence before the court, and only marginally relevant. The evidence was not constitutionally required. Therefore, the military judge did not abuse his discretion by excluding evidence of Amn MM's sexual practices beyond those between Amn MM and Appellant.

Assuming *arguendo* ***[*122]*** that there was error in excluding the evidence, we find it harmless beyond a reasonable doubt because the verdict would not have changed if the evidence was admitted. The evidence was only marginally relevant as it did not involve slapping of the face and provided only scant support to a theory of consent to the charged battery or the abusive sexual contact. Additionally, it did not positively contribute to whether a mistake of fact—if honestly held by Appellant—would be reasonable under the circumstances. The Government's case was very strong. The Defense elected to put on a findings case regarding Amn MM which did little to weaken the Government's case as it relied largely on Appellant's contradictory versions of what happened. If admitted, the military judge would not have received a different impression of the evidence or Amn MM. Therefore, if there was error, it was harmless beyond a reasonable doubt.

F. Ineffective Assistance of Counsel

1. Additional Background

Appellate defense counsel raises three grounds for ineffective assistance of trial defense counsel in that Appellant's counsel: (1) failed to provide evidence to support Appellant's mistake of fact as to consent defense to **[*123]** AB EA's allegations; (2) failed to rebut testimony of a government witness, A1C BD, to whom Appellant purportedly confessed to raping AB EA; and (3) failed to adequately prepare a sentencing witness, AJ—Appellant's mother—for her testimony.

Our court ordered Appellant's civilian defense counsel, Mr. JE, and his military defense counsel, Major (Maj) BH, to provide responsive declarations.[38] We have considered whether a post-trial evidentiary hearing is required to resolve any factual disputes between Appellant's and AJ's assertions and the trial defense counsel team's assertions. *See United States v. Ginn, 47 M.J. 236, 248 (C.A.A.F. 1997)*; *DuBay, 37 C.M.R. at 413*. We find a hearing unnecessary to resolve Appellant's claims.

2. Law

HN45[↑] The *Sixth Amendment* guarantees an accused the right to effective assistance of counsel. *United States v. Gilley, 56 M.J. 113, 124 (C.A.A.F. 2001)*. In assessing the effectiveness of counsel, we apply the standard set forth in *Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)*, and begin with the presumption of competence announced in *United States v. Cronic, 466 U.S. 648, 658, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984)*. *See Gilley, 56 M.J. at 124* (citing *United States v. Grigoruk, 52 M.J. 312, 315 (C.A.A.F. 2000)*). We review allegations of ineffective assistance de novo. *United States v. Gooch, 69 M.J. 353, 362 (C.A.A.F. 2011)* (citing *Mazza, 67 M.J. at 474*).

HN46[↑] We utilize the following three-part test to determine whether the presumption of competence has been overcome:

> 1. Are appellant's allegations true; if so, "is there a reasonable explanation for counsel's actions"?
>
> 2. If the allegations are true, did **[*124]** defense counsel's level of advocacy "fall measurably below the performance . . . [ordinarily expected] of fallible lawyers"?
>
> 3. If defense counsel was ineffective, is there "a reasonable probability that, absent the errors," there would have been a different result?

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[38] An additional declaration was provided to the court from the defense paralegal but we do not find it necessary to consider its contents.

Id. (alterations in original) (quoting United States v. Polk, 32 M.J. 150, 153 (C.M.A. 1991)). The burden is on the appellant to demonstrate both deficient performance and prejudice. United States v. Datavs, 71 M.J. 420, 424 (C.A.A.F. 2012) (citation omitted).

HN47[↑] "Defense counsel do not perform deficiently when they make a strategic decision to accept a risk or forego a potential benefit, where it is objectively reasonable to do so." *Id.* (citing Gooch, 69 M.J. at 362-63) (additional citation omitted). In reviewing the decisions and actions of trial defense counsel, this court does not second-guess strategic or tactical decisions. *See* United States v. Morgan, 37 M.J. 407, 410 (C.M.A. 1993) (citations omitted). It is only in those limited circumstances where a purported "strategic" or "deliberate" decision is unreasonable or based on inadequate investigation that it can provide the foundation for a finding of ineffective assistance. *See* United States v. Davis, 60 M.J. 469, 474 (C.A.A.F. 2005).

3. Analysis

We find each of the claims of ineffective assistance of counsel to be without merit.

a. Mistake of Fact as to Consent — AB EA

Appellant's first claim centers on a failure **[*125]** to elicit evidence that AB EA had a "crush" on Appellant or use such evidence to challenge AB EA. Appellant argues this was "clear error" and would have lent support to his mistake of fact as to consent defense. Appellant argues that his wife, A1C PC, was ready to testify about AB EA's "crush" on him and A1C PC provided a declaration to this effect. On appeal, Appellant also argues another friend, Amn CH, could have testified similarly to A1C PC. Finally, before us, Appellant declares that he "knew [AB EA] had a crush on [him]."

Maj BH conducted the direct examination of A1C PC and elicited that Appellant and AB EA acted as if they were close friends. On cross-examination A1C PC confirmed Appellant and AB EA were close friends. The ultimate question of whether AB EA had a "crush" on Appellant was not asked of A1C PC.

In her declaration, Maj BH explained that the defense team made a strategic decision not to ask A1C PC the ultimate question about a "crush." The Defense believed most of the flirting between AB EA and Appellant took place after A1C PC left technical training and moved to her first permanent duty assignment. This led the Defense to question whether A1C PC had sufficient **[*126]** personal knowledge to give an opinion about a "crush." Further, the Defense had concerns that on cross-examination A1C PC would be forced to admit that Appellant may have also had a "crush" on AB EA or at least his actions would suggest so. We conclude the defense team provided a reasonable explanation for why A1C PC was not asked the ultimate question about AB EA having a "crush" on Appellant.

Amn CH was requested as a defense witness and traveled to the court-martial but did not testify. Amn CH provided a declaration to us that he does not know why he was never called to testify. His declaration says nothing about him telling the defense team that AB EA had a "crush" on Appellant. Maj BH's declaration shows that Amn CH was interviewed multiple times and did not relay a belief that AB EA had a "crush" on Appellant. As the defense team had no factual basis for calling Amn CH to provide an opinion about AB EA's "crush" on Appellant we find a reasonable explanation for their decision to not call him to testify on this matter.

b. Failure to Rebut Testimony of A1C BD

A1C BD knew Appellant, AB EA, and Amn CH and was in their friend group. He did not personally know Amn MM. When A1C BD testified **[*127]** for the Government much of his testimony involved his terribly poor recollection of three-way phone calls between Appellant, A1C BD, and Amn CH which occurred after A1C BD heard from AB EA that Appellant had "raped" her.

In his trial testimony, A1C BD was not confident and not at all sure what Appellant said on the three-way call. He testified he could not fully and accurately testify to what Appellant said. A1C BD agreed he made an earlier written statement to AFOSI when the phone call was fresher in his mind and at the time he believed his statement to AFOSI was truthful. Without objection, A1C BD read from that statement: Appellant "later on called me and [Amn CH] into a conference call and told me he raped [AB EA] straight up," and "in the conference call [Appellant] mentioned that the situation started with consent and then later on during intercourse she told him to stop, but [AB EA] stated before the conference call that he straight up raped her with no consent at all."

On cross-examination, A1C BD explained that after he made his first written statement to AFOSI, there was another three-way phone call between him, Appellant,

and Amn CH. Appellant had seen A1C BD's written statement **[*128]** and said, "[Y]ou lied on me. I didn't say that I raped her. We're no longer friends." After this later three-way conversation, A1C BD told one of the trial counsel that Appellant had not said that he raped AB EA, but said that he "[f]'ed up." Later in cross-examination, A1C BD admitted he had "no idea" whether Appellant ever said he raped AB EA but he was certain that AB EA told him that Appellant raped her. Finally, A1C BD admitted it was possible that Appellant told him in the first three-way conversation "I f***ed up" and that A1C BD interpreted it as him admitting he raped AB EA.

Amn CH provided a declaration that he recalled a three-way phone call with A1C BD and Appellant where Appellant said "I f***ed up." Amn CH recalled asking how and Appellant answering that "he cheated on his wife," A1C PC. Amn CH denied Appellant said anything about raping AB EA.

Maj BH's declaration explains that the Defense initially expected Amn CH to testify consistent with his post-trial declaration. This is why he was on the defense witness list and was traveled for the trial at government expense. However, when the Defense interviewed him before trial, Amn CH was no longer adamant that Appellant did **[*129]** not confess and could not really remember what was said since it happened so long ago. According to Maj BH, Amn CH also disclosed new information to the defense team that we need not detail here that led the defense team to make the strategic decision not to call him to the stand as the risk far outweighed the benefit.

We conclude that trial defense counsel's explanation for not calling Amn CH was reasonable under the circumstances and based on proper investigation of the facts, as they could be best determined. Therefore, we do not second-guess this strategic decision. Before us, appellate defense counsel would balance the risk of having Amn CH testify differently and find it objectively unreasonable as Amn CH's testimony would have been "crucial to the Defense" and that A1C BD's testimony was "extremely harmful." Of course, the first presumption in this argument is that Amn CH would have testified consistently with his declaration to us rather than what he told Maj BH prior to trial. Even if Amn CH would have testified in that manner, we see A1C BD's testimony quite differently than appellate defense counsel. We did not rely on A1C BD's testimony in determining legal and factual sufficiency **[*130]** of the convictions involving AB EA because it was inconsistent and unreliable. Having successfully blunted A1C BD's testimony with effective cross-examination, the defense team's decision to decline to call Amn CH as a witness when he could have reversed what was gained during cross-examination of A1C BD was objectively reasonable.

c. Failure to Prepare AJ to Testify in Sentencing

Appellant's mother, AJ, provided a declaration to this court in which she states,

> [I] never sat down with [Appellant's] attorneys to prepare for my testimony or to discuss what questions they would ask. We also never discussed what I should not say. Instead they told me that they just ask about how [Appellant] was raised. That was all the information and preparation they gave me.

Mr. JE recalled speaking with AJ on more than one occasion prior to trial and discussing her testimony during the trial. Mr. JE noted that Maj BH dealt the most with AJ as they had developed a rapport from their frequent conversations. Mr. JE recalled discussions with Maj BH on how limited AJ's testimony would have to be to avoid opening the door to rebuttal evidence in the form of newly discovered evidence known to the Defense that **[*131]** had the ability to hurt Appellant's case. Mr. JE recalled AJ being prepped further during the military judge's deliberations. Mr. JE declared this lasted for "over an hour" where Maj BH and the defense paralegal "went over [AJ's] testimony in great detail." After Appellant was convicted the defense team spoke with AJ before the sentencing portion of the trial to make sure she remembered what had been discussed with her and to answer any last-minute questions. Mr. JE recalled AJ expressing disbelief with the convictions and he was concerned whether she would be able to keep her composure. Mr. JE noted AJ was the only person who could testify about Appellant's upbringing and tragic personal history and that Maj BH "went over appropriate testimony with [AJ] and was reassured this was something she could handle." Maj BH declared that AJ "assured me she could handle herself on the stand if need be." Mr. JE recalled Appellant advocating for AJ to speak on his behalf. Mr. JE explained that despite the preparation, AJ opened the door to damaging evidence and apologized afterwards.

Maj BH's declaration is consistent with Mr. JE's. Maj BH explained she did not tell AJ the exact questions she **[*132]** would ask as Maj BJ wanted the answers to

be authentic but they did discuss the general topics, including the story of AJ gaining custody of Appellant and his upbringing, and her testimony would be limited as there was new evidence that could possibly hurt her son's sentencing case. Maj BH recalled speaking to AJ four times, twice before trial, once during findings deliberations, and then after the verdict. Maj BH was hesitant to call AJ to the stand when they met during deliberations as AJ had an outburst from the gallery while court was in session. However, AJ "assured" Maj BH that she "could handle herself on the stand if need be, but [AJ] was certain her son would be found not guilty." After the conviction, Maj BH recalled AJ expressing disbelief with the verdict and being visibly upset. Maj BH spent an hour calming AJ down and talking about the plan for her testimony the next day. Maj BH went over appropriate testimony so AJ would not impeach the verdict or open the door to damaging rebuttal evidence. Maj BH declared AJ was "fully prepped" and knew "what subjects were going to be covered and knew what things she could not say" but when "on the stand, [AJ's] emotions got the better **[*133]** of her and she unfortunately opened the door to evidence that was damaging" to Appellant. Maj BH also recalled AJ apologizing after her testimony because AJ "knew better" but was "overcome with anger" while she was on the stand.

The beginning of AJ's testimony was effective and powerful. According to AJ, Appellant was born addicted to crack cocaine as his biological mother was a drug user and drug dealer. His biological father was also a drug dealer. When Appellant was less than a month old, his biological mother brought him into a crack house, which re-exposed him to the drug and only after AJ's intervention was he taken to the hospital for drug treatment. AJ described the withdrawal symptoms that Appellant experienced, the medications he had to take, her efforts to comfort him, and long-term effects that Appellant, his siblings, and step-siblings suffered from the actions of his biological parents. AJ explained a harrowing process of caring for Appellant and coping with threats that Appellant's biological father made to kill her and Appellant. Eventually, she escaped to Texas from Buffalo, New York and raised Appellant with her husband.

After AJ described some of the impact of Appellant's **[*134]** investigation, Maj BH asked "have you seen a change in your son since this has come about, in his demeanor or the way he acts?" AJ answered "I have. He—He's a different person. Since meeting and marrying [A1C PC], he is really a different person. So—but, I mean, he's more loving." After some additional comments about Appellant being loving to his family, AJ continued, "He's always cared about everybody, and I never could imagine him hurting anyone ever. He's never done anything—nothing like this. This is out of his character. He's never been in trouble. This is—this is just ludicrous to me. I don't understand." After a trial counsel objection that AJ was impeaching the verdict which the military judge said, "I don't think she was, but to the extent she was, I'm not considering it for that purpose." AJ, without a further question from Maj BH, added "He's never done anything ever." Maj BH continued her questioning eliciting favorable information regarding Appellant's age, his family, and that he was going to be a totally different person after this.

In rebuttal to AJ's testimony and other character statements admitted as defense exhibits, the Government admitted, over defense objection, **[*135]** excerpts from another AFOSI investigation of Appellant for abusive sexual contact of a third female technical training student, A1C SP. AFOSI completed this investigation of Appellant a little more than a month before trial on 16 August 2018. The excerpt contained a summary of A1C SP's victim interview about an incident with Appellant in her dormitory room in the building where she and Appellant lived. The AFOSI interview of A1C SP was conducted on 30 May 2018 and the incident occurred in late September or early October 2017. Before the Government's rebuttal evidence was offered, the Defense had requested the rules of evidence be relaxed prior to admission of the defense sentencing exhibits and the military judge granted that request as to hearsay, authentication, and foundation.

The AFOSI excerpt described an incident where Appellant kissed A1C SP and placed his hands on her breasts and buttocks over her clothing, without her consent, and grabbed her by the wrist and placed her hand on his erect penis. The excerpt indicated that A1C SP's dorm room door was open when this occurred. Based on the dates in the excerpt, the incident involving A1C SP was after the charged offenses against **[*136]** Amn MM, but before the charged offenses against AB EA. The incident also appeared to be about a month or less before Appellant's marriage to A1C PC.

While AJ's declaration is facially adequate to raise a lack of preparation by the trial defense counsel, the record as a whole compellingly demonstrates the improbability of those facts, so we have discounted those factual assertions and will decide the legal issue

before us. *See* *Ginn, 47 M.J. at 248*. First, the record of trial shows that at two points in the trial the military judge instructed the spectators to refrain from having outbursts or otherwise showing an inability to control their emotions. These instructions occurred immediately before findings were announced and the next day shortly before AJ testified. The transcript makes clear that AJ approached the witness stand from the gallery which demonstrates that she observed at least parts of the trial. We find these portions of the record lend support to the defense team's recollections of AJ having difficulty with retaining her composure in light of the verdict.

The content of AJ's testimony definitively demonstrates that she lost her composure. The question asked by Maj BH related to how Appellant **[*137]** had changed. AJ's answer was mostly nonresponsive and addressed how Appellant had always cared about everybody, had never done anything like this, that this was out of character, ludicrous, and something she could not understand. The words used by AJ lend credibility to the defense counsels' assertions that they had concerns about calling her as a witness given her emotional state, a matter which is not addressed in her declaration.

But the fact that the defense team had legitimate concerns about whether AJ could control her emotions on the stand that proved to be warranted does not mean that the trial defense team provided ineffective assistance of counsel. Trial defense counsel made a deliberate decision to take a calculated risk in calling AJ to testify. That decision did not work out as planned but undoubtedly AJ still provided meaningful and helpful testimony in other areas. We cannot say the decision by the Defense to call AJ was unreasonable or based on inadequate investigation. We also cannot see how more preparation of AJ would have rectified her emotional state post-verdict. The question was not particularly challenging to answer and AJ's answer was mostly nonresponsive. In **[*138]** his reply brief, Appellant suggests a written statement or affidavit would have been a better choice. Such a suggestion is made with the benefit of hindsight and is the type of second-guessing that we do not engage in when there is proper investigation and a reasonable strategic decision to accept a risk.

Even if AJ's declaration is accurate and the trial defense counsel failed to properly prepare her sufficiently, we find that their performance did not fall measurably below that ordinarily expected of fallible lawyers. The defense team expected that AJ would be up to the task of providing responsive answers to the questions asked, AJ assured them that she could handle testifying, and Appellant wanted AJ to testify. AJ's declaration does not contradict any of these points. The defense counsel took a risk and it is one that we believe other defense lawyers would have taken knowing the powerful evidence about Appellant's upbringing that AJ could and did provide. ***HN48***[] We evaluate trial defense counsel's performance not by the success of their strategy, "but rather whether counsel made . . . objectively reasonable choice[s] in strategy from the alternatives available at the [trial]." *See* *United States v. Dewrell, 55 M.J. 131, 136 (C.A.A.F. 2001)* (quoting **[*139]** *United States v. Hughes, 48 M.J. 700, 718 (A.F. Ct. Crim. App. 1998)*, *aff'd*, *52 M.J. 278 (C.A.A.F. 2000))*. Appellant has failed to overcome the strong presumption that counsel's performance was within the wide range of reasonable professional assistance.

Finally, we address whether there was a reasonable probability that, absent the error, there would have been a different result. Appellant does not claim his counsel were ineffective by offering character statements on his behalf. Yet it is clear from the military judge's ruling that the rebuttal evidence was admitted because of AJ's testimony and portions[39] of the character statements. Appellant has not shown that the rebuttal evidence would have been rejected even if AJ's testimony had not gone astray. Further, when the military judge ruled on the admissibility of the excerpt regarding A1C SP, in conducting a *sua sponte* Mil. R. Evid. 403 balancing test, he noted he would only use this evidence "for the narrow purpose" to "explain or repel, counteract, [or] assist me in placing context" the character letters and the testimony of AJ and that he had "no concerns" that he would confuse this with the charges of which he convicted Appellant or that it was unfairly prejudicial. Appellant was convicted of serious charges involving two victims. We cannot **[*140]** say that there is a reasonable probability of a lower sentence if the testimony of AJ was not presented or if the Defense had only offered a written statement from AJ. Therefore, we find Appellant has failed to demonstrate either deficient performance by his counsel or prejudice. *See* *Datavs, 71 M.J. at 424* (citation omitted).

G. Post-Trial Delay

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[39] For example, one character letter stated that Appellant "is big on respect for all human beings, but especially women."

Appellant's case was docketed with this court on 7 February 2019. Appellant filed his assignments of error brief almost a year later on 3 February 2020 after his counsel requested and was granted nine enlargements of time to file his brief. Of the nine requests by counsel, Appellant explicitly consented to the last four. The Government opposed each of Appellant's requests.

We granted one extension of time to the Government which permitted it to file an answer brief 30 days after the receipt of the declarations we ordered from Appellant's trial defense team. Appellant did not oppose this extension of time. On 20 April 2020, the Government timely filed its answer brief. Appellant timely filed his reply brief on 27 April 2020.

HN49[] "We review de novo claims that an appellant has been denied the due process right to a speedy post-trial review and appeal." United States v. Moreno, 63 M.J. 129, 135 (C.A.A.F. 2006) (citations omitted). **[*141]** In *Moreno*, the CAAF established a presumption of facially unreasonable delay when a Court of Criminal Appeals does not render a decision within 18 months of docketing. 63 M.J. at 142. Where there is such a delay, we examine the four factors set forth in Barker v. Wingo, 407 U.S. 514, 530, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972): (1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of his right to a timely review; and (4) prejudice to the appellant. Moreno, 63 M.J. at 135 (citations omitted). "No single factor is required for finding a due process violation and the absence of a given factor will not prevent such a finding." Id. at 136 (citing Barker, 407 U.S. at 533).

HN50[] However, where an appellant has not shown prejudice from the delay, there is no due process violation unless the delay is so egregious as to "adversely affect the public's perception of the fairness and integrity of the military justice system." United States v. Toohey, 63 M.J. 353, 362 (C.A.A.F. 2006). In *Moreno*, the CAAF identified three types of cognizable prejudice for purposes of an Appellant's due process right to timely post-trial review: (1) oppressive incarceration; (2) anxiety and concern; and (3) impairment of the appellant's ability to present a defense at a rehearing. 63 M.J. at 138-39 (citations omitted). In this case, we find no oppressive incarceration nor impairment of the Defense **[*142]** at a rehearing because Appellant has not prevailed in his appeal. *See id. at 140*. HN51[] As for anxiety and concern, the CAAF has explained "the appropriate test for the military justice system is to require an appellant to show particularized anxiety or concern that is distinguishable from the normal anxiety experienced by prisoners awaiting an appellate decision." *Id.* Appellant has articulated no such particularized anxiety in this case, and we discern none. To the contrary, Appellant explicitly consented to the last four enlargements of time, which we find is some indication that Appellant understood that his appellate counsel required additional time to thoroughly address each assignment of error.

HN52[] Where, as here, there is no qualifying prejudice from the delay, there is no due process violation unless the delay is so egregious as to "adversely affect the public's perception of the fairness and integrity of the military justice system." Toohey, 63 M.J. at 362. We do not find such egregious delays here. The record of trial includes eight volumes plus an additional appellate volume as the filings are voluminous. The proceedings took place over seven days, and the transcript is over 1,000 pages. Appellant raised a dozen **[*143]** issues for our consideration. Additionally, much of the appellate delay in this case is attributable to the Defense. This court is issuing its opinion within three months and one week of the *Moreno* date. Appellant has neither demanded speedy appellate review nor asserted that he is entitled to relief for appellate delay. Accordingly, we do not find the delay so egregious as to adversely affect the perceived fairness and integrity of the military justice system. *Id.*

Recognizing our authority under *Article 66(c), UCMJ, 10 U.S.C. § 866(c)*, we have also considered whether relief for excessive post-trial delay is appropriate even in the absence of a due process violation. *See* United States v. Tardif, 57 M.J. 219, 225 (C.A.A.F. 2002). After considering the factors enumerated in United States v. Gay, 74 M.J. 736, 744 (A.F. Ct. Crim. App. 2015), *aff'd*, 75 M.J. 264 (C.A.A.F. 2016), we conclude it is not.

III. Conclusion

We affirm only so much of the sentence as provides for: a dishonorable discharge, confinement for 10 years, forfeiture of all pay and allowances, and reduction to the grade of E-1. The approved findings and sentence, as modified, are correct in law and fact, and no further error materially prejudicial to the substantial rights of Appellant occurred. Articles 59(a) and *66(c)*, UCMJ, 10 U.S.C. §§ 859(a), *866(c)*. Accordingly, the approved findings and sentence, as modified, **[*144]** are

AFFIRMED.[40],[41]

End of Document

[40] The CMO contains an error that requires correction. Specification 4 of the Charge, the abusive sexual contact offense involving Amn MM, lists one phrase of excepted words as "using lawful force" when the excepted words were "using unlawful force." We order a corrected CMO.

[41] Two pages are missing from Appellant's post-trial and appellate rights advisement, a required appellate exhibit under R.C.M. 1010. Appellant does not raise a claim that the record of trial is incomplete or that he was prejudiced because pages are missing. We find the omission of these pages insubstantial and their absence does not render the record of trial incomplete. *Article 54(c), UCMJ, 10 U.S.C. § 854(c)*; *see United States v. Davenport, 73 M.J. 373, 376-77 (C.A.A.F. 2014)*; *United States v. Lovely, 73 M.J. 658, 676 (A.F. Ct. Crim. App. 2014)*.

United States v. Frantz

United States Air Force Court of Criminal Appeals

November 10, 2020, Decided

No. ACM 39657

Reporter
2020 CCA LEXIS 404 *; 2020 WL 6817746

UNITED STATES, Appellee v. Cory J. FRANTZ, Senior Airman (E-4), U.S. Air Force, Appellant

Notice: NOT FOR PUBLICATION

Subsequent History: Petition for review filed by *United States v. Frantz, 81 M.J. 132, 2021 CAAF LEXIS 123, 2021 WL 857535 (C.A.A.F., Feb. 8, 2021)*

Motion granted by *AF. United States v. Frantz, 81 M.J. 138, 2021 CAAF LEXIS 108, 2021 WL 900999 (C.A.A.F., Feb. 9, 2021)*

Review granted by *United States v. Frantz, 81 M.J. 175, 2021 CAAF LEXIS 252, 2021 WL 1392207 (C.A.A.F., Mar. 23, 2021)*

Affirmed by *United States v. Frantz, 2021 CAAF LEXIS 744 (C.A.A.F., Aug. 10, 2021)*

Prior History: [*1] Appeal from the United States Air Force Trial Judiciary. Military Judge: Mark W. Milam. Approved sentence: Dishonorable discharge, confinement for 7 years, and reduction to E-1. Sentence adjudged 19 October 2018 by GCM convened at Aviano Air Base, Italy.

Case Summary

Overview

HOLDINGS: [1]-Sufficient evidence supported appellant's conviction for committing lewd acts upon a child, *10 U.S.C.S. § 920b*, because it was uncontested that he sent indecent communications to the child and there was sufficient evidence of sexual contact with the child to gratify his sexual desire; [2]-The 7-year sentence was not impermissibly severe in violation of *10 U.S.C.S. § 866* because the nature of the offense was severe where evidence revealed appellant exploited his 9-year-old stepdaughter and possible punishment included confinement for 35 years; [3]-Miramar Brig polices restricting appellant's contact with his son did not violate the *Fifth* and *Eighth Amendments* because he did not demonstrate punishment incompatible with evolving standards of decency, unnecessary and wanton infliction of pain, or an act or omission resulting in the denial of necessities.

Outcome
Findings and modified sentence affirmed.

LexisNexis® Headnotes

Military & Veterans Law > ... > Courts Martial > Evidence > Weight & Sufficiency of Evidence

HN1 **Evidence, Weight & Sufficiency of Evidence**

The appellate court will review issues of legal and factual sufficiency de novo. Appellate assessment of legal and factual sufficiency is limited to the evidence produced at trial.

Criminal Law & Procedure > ... > Standards of Review > Substantial Evidence > Sufficiency of Evidence

Military & Veterans Law > ... > Courts Martial > Evidence > Weight & Sufficiency of Evidence

HN2 **Substantial Evidence, Sufficiency of Evidence**

The test for legal sufficiency is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. In resolving questions of legal

sufficiency, the appellate court is bound to draw every reasonable inference from the evidence of record in favor of the prosecution. As a result, the standard for legal sufficiency involves a very low threshold to sustain a conviction.

Military & Veterans Law > ... > Courts Martial > Evidence > Weight & Sufficiency of Evidence

HN3 **Evidence, Weight & Sufficiency of Evidence**

The test for factual sufficiency is whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, the appellate court is convinced of the appellant's guilt beyond a reasonable doubt. In conducting this unique appellate role, the appellate court will take a fresh, impartial look at the evidence, applying neither a presumption of innocence nor a presumption of guilt to make our its own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt.

Military & Veterans Law > Military Offenses > Assault

Military & Veterans Law > Military Offenses > General Article > Indecent Language

Military & Veterans Law > Military Offenses > Rape & Sexual Assault of a Child

Military & Veterans Law > Military Offenses > Rape & Sexual Assault

Military & Veterans Law > Military Offenses > Attempts

HN4 **Military Offenses, Assault**

The term lewd act includes, inter alia, any sexual contact with a child and intentionally communicating indecent language to a child by any means, including via any communication technology, with an intent to arouse or gratify the sexual desire of any person. Manual Courts-Martial pt. IV, para. 45b.a.(h)(5). Indecent language is that which is grossly offensive to modesty, decency, or propriety, or shocks the moral sense, because of its vulgar, filthy, or disgusting nature, or its tendency to incite lustful thought. Language is indecent if it tends reasonably to corrupt morals or incite libidinous thoughts. Manual Courts-Martial pt. IV, para. 89.c. Sexual contact includes any touching either directly or through the clothing, [of] any body part of any person, if done with an intent to arouse or gratify the sexual desire of any person. Manual Courts-Martial pt. IV, para. 45.a.(g)(2) and 45b.a.(h)(1).

Military & Veterans Law > Military Offenses > General Article > Indecent Language

HN5 **General Article, Indecent Language**

With respect to the content of the messages, the indecency of a communication depends on the context in which it is made.

Criminal Law & Procedure > ... > Standards of Review > De Novo Review > Conclusions of Law

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN6 **De Novo Review, Conclusions of Law**

Whether a verdict is ambiguous and thus precludes a Court of Criminal Appeals from performing a factual sufficiency review is a question of law reviewed de novo.

Military & Veterans Law > ... > Courts Martial > Sentences > Capital Punishment

Military & Veterans Law > ... > Courts Martial > Pretrial Proceedings > Charges & Specifications

Military & Veterans Law > ... > Courts Martial > Sentences > Deliberations, Instructions & Voting

Military & Veterans Law > Military Justice > Apprehension & Restraint of Civilians & Military Personnel > Restrictions

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Findings

HN7[] Sentences, Capital Punishment

One or more words or figures may be excepted from a specification, and, when necessary, others substituted, if the remaining language of the specification, with or without substitutions, states an offense by the accused which is punishable by court-martial. R.C.M. 918(a)(1), Manual Courts-Martial.

Military & Veterans Law > ... > Courts Martial > Pretrial Proceedings > Charges & Specifications

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Findings

HN8[] Pretrial Proceedings, Charges & Specifications

When the phrase on divers occasions' is removed from a specification, the effect is that the accused has been found guilty of misconduct on a single occasion and not guilty on the remaining occasions. If there is no indication on the record which of the alleged incidents forms the basis of the conviction, then the findings of guilt are ambiguous and the Court of Criminal Appeals cannot perform a factual sufficiency review. The remedy for a Walters violation is to set aside the finding of guilty to the affected specification and dismiss it with prejudice.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Criminal Law & Procedure > ... > Discovery & Inspection > Brady Materials > Brady Claims

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Due Process

HN9[] Procedural Due Process, Scope of Protection

The suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. The United States Supreme Court has extended Brady, clarifying that the duty to disclose such evidence is applicable even though there has been no request by the accused and that the duty encompasses impeachment evidence as well as exculpatory evidence.

Military & Veterans Law > ... > Evidence > Relevance > Confusion, Prejudice & Waste of Time

Military & Veterans Law > Military Justice > Disclosure & Discovery > Discovery by Defense

Military & Veterans Law > Military Justice > Disclosure & Discovery > Disclosure by Government

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Judge Advocate Review

Military & Veterans Law > ... > Courts Martial > Evidence > Preliminary Questions

HN10[] Relevance, Confusion, Prejudice & Waste of Time

A military accused also has the right to obtain favorable evidence under Unif. Code Mil. Justice art. 46, as implemented by R.C.M. 701-703, Manual Courts-Martial and these implementing rules provide a military accused statutory discovery rights greater than those afforded by the United States Constitution. With respect to discovery, R.C.M. 701(a)(2)(A), Manual Courts-Martial requires the Government, upon defense request, to permit the inspection of, inter alia, any documents within the possession, custody, or control of military authorities, and which are material to the preparation of the defense. With respect to production, each party is entitled to the production of evidence which is relevant and necessary. R.C.M. 703(f)(1), Manual Courts-Martial. Evidence is relevant if it has any tendency to make a fact more or less probable than it would be without the evidence and is of consequence in determining the action. Mil. R. Evid. 401, Manual Courts-Martial. Relevant evidence is necessary when it is not cumulative and when it would contribute to a party's presentation of the case in some positive way on a matter in issue. R.C.M. 703(f)(1), Manual Courts-Martial.

Military & Veterans Law > Military Justice > Disclosure & Discovery > Disclosure by Government

Military & Veterans Law > Military Justice > Disclosure & Discovery > Discovery by Defense

Military & Veterans Law > ... > Trial Procedures > Witnesses > Examination of Witnesses

Military & Veterans Law > ... > Witnesses > Compulsory Attendance of Witnesses > Interrogation & Presentation

Military & Veterans Law > Military Justice > Judicial Review > US Court of Appeals for the Armed Forces

HN11 **Disclosure & Discovery, Disclosure by Government**

Each party to a court-martial must have an equal opportunity to inspect evidence and to obtain witnesses and other evidence. R.C.M. 701(e), Manual Courts-Martial; Unif. Code Mil. Justice art. 46. The United States Court of Appeals for the Armed Forces (CAAF) has interpreted this requirement to mean that the Government has a duty to use good faith and due diligence to preserve and protect evidence and make it available to an accused. The duty to preserve includes: (1) evidence that has an apparent exculpatory value and that has no comparable substitute; (2) evidence that is of such central importance to the defense that it is essential to a fair trial; and (3) statements of witnesses testifying at trial.

Military & Veterans Law > Military Justice > Disclosure & Discovery > Discovery Misconduct

Military & Veterans Law > ... > Courts Martial > Motions > Procedures

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Waivers & Withdrawals of Appeals

Military & Veterans Law > ... > Courts Martial > Sentences > Fines & Forfeitures

Military & Veterans Law > Military Justice > Disclosure & Discovery > Discovery by Defense

HN12 **Disclosure & Discovery, Discovery Misconduct**

A party's failure to move to compel discovery or for production of witnesses or evidence before pleas are entered constitutes waiver. R.C.M. 905(b)(4) and (e), Manual Courts-Martial. Where R.C.M. 905(e) refers to waiver it means waiver rather than forfeiture.

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Appeal by United States

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Waivers & Withdrawals of Appeals

Military & Veterans Law > ... > Courts Martial > Pretrial Proceedings > Investigations

Military & Veterans Law > Military Justice > Apprehension & Restraint of Civilians & Military Personnel > Unlawful Restraint

HN13 **Trial Procedures, Appeal by United States**

In general, a valid waiver leaves no error to correct on appeal. We recognize our authority pursuant to Unif. Code Mil. Justice art. 66, *10 U.S.C.S. § 866*, to pierce waiver in order to correct a legal error in the proceedings.

Criminal Law & Procedure > ... > Standards of Review > Plain Error > Definition of Plain Error

Military & Veterans Law > ... > Courts Martial > Judges > Challenges to Judges

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Judicial Discretion

Military & Veterans Law > ... > Courts Martial > Evidence > Evidentiary Rulings

HN14 **Plain Error, Definition of Plain Error**

The appellate court will review a military judge's decision not to recuse himself for an abuse of discretion. A military judge abuses his discretion when: (1) the findings of fact upon which he predicates his ruling are not supported by the evidence of record; (2) if incorrect legal principles were used; or (3) if his application of the correct legal principles to the facts is clearly unreasonable. However, when an appellant does not raise the issue of disqualification until appeal, we examine the claim under the plain error standard of review. Plain error occurs when (1) there is error, (2) the error is plain or obvious, and (3) the error results in material prejudice.

Criminal Law & Procedure > Preliminary Proceedings > Pretrial Motions & Procedures > Disqualification & Recusal

Military & Veterans Law > ... > Courts Martial > Judges > Challenges to Judges

Military & Veterans Law > ... > Courts Martial > Sentences > Deliberations, Instructions & Voting

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Staff Judge Advocate Recommendations

Military & Veterans Law > ... > Courts Martial > Motions > Motions for Mistrial

HN15 **Pretrial Motions & Procedures, Disqualification & Recusal**

An accused has a constitutional right to an impartial judge. R.C.M. 902, Manual Courts-Martial governs disqualification of the military judge. R.C.M. 902(b) sets forth five specific circumstances in which a military judge shall disqualify himself or herself. In addition, R.C.M. 902(a) requires disqualification in any proceeding in which the military judge's impartiality might reasonably be questioned. Disqualification pursuant to R.C.M. 902(a) is determined by applying an objective standard of whether a reasonable person knowing all the circumstances would conclude that the military judge's impartiality might reasonably be questioned.

Military & Veterans Law > ... > Courts Martial > Judges > Challenges to Judges

Military & Veterans Law > ... > Courts Martial > Sentences > Deliberations, Instructions & Voting

Military & Veterans Law > Military Justice > Courts Martial > Court-Martial Member Panel

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Judicial Discretion

HN16 **Judges, Challenges to Judges**

There is a strong presumption that a judge is impartial, and a party seeking to demonstrate bias must overcome a high hurdle. A military judge should not leave a case unnecessarily. R.C.M. 902(d)(1), Manual Courts-Martial. Although a judge has a duty not to sit when disqualified, the judge has an equal duty to sit on a case when not disqualified.

Military & Veterans Law > ... > Courts Martial > Sentences > Deliberations, Instructions & Voting

Military & Veterans Law > ... > Witnesses > Compulsory Attendance of Witnesses > Interrogation & Presentation

Military & Veterans Law > ... > Trial Procedures > Witnesses > Examination of Witnesses

Military & Veterans Law > ... > Evidence > Admissibility of Evidence > Sex Offenses

HN17 **Sentences, Deliberations, Instructions & Voting**

A military judge must not become an advocate for a party but must vigilantly remain impartial during the trial. However, a military judge is not a mere referee but, rather, properly may participate actively in the proceedings. Thus, while a military judge must maintain his fulcrum position of impartiality, the judge can and sometimes must ask questions in order to clear up uncertainties in the evidence or to develop the facts further. Mil. R. Evid. 614, Manual Courts-Martial permits the military judge to call and examine witnesses.

Military & Veterans Law > ... > Courts Martial > Judges > Challenges to Judges

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN18[] **Judges, Challenges to Judges**

The appellate court will review the military judge's decision not to disqualify himself sua sponte for plain error.

Military & Veterans Law > ... > Courts Martial > Judges > Challenges to Judges

Military & Veterans Law > Military Justice > Courts Martial > Court-Martial Member Panel

Military & Veterans Law > ... > Courts Martial > Evidence > Objections & Offers of Proof

Military & Veterans Law > ... > Courts Martial > Sentences > Deliberations, Instructions & Voting

HN19[] **Judges, Challenges to Judges**

Failure to object at trial to alleged partisan action on the part of a military judge may present an inference that the defense believed that the military judge remained impartial.

Criminal Law & Procedure > Preliminary Proceedings > Pretrial Motions & Procedures > Disqualification & Recusal

HN20[] **Pretrial Motions & Procedures, Disqualification & Recusal**

Judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge.

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN21[] **Judicial Review, Courts of Criminal Appeals**

The appellate court will review issues of sentence appropriateness de novo. It may affirm only as much of the sentence as it finds correct in law and fact and determine should be approved on the basis of the entire record. Unif. Code Mil. Justice art. 66(c), *10 U.S.C.S. § 866(c)*. We assess sentence appropriateness by considering the particular appellant, the nature and seriousness of the offenses, the appellant's record of service, and all matters contained in the record of trial. Although we have great discretion to determine whether a sentence is appropriate, we have no authority to grant mercy.

Military & Veterans Law > ... > Courts Martial > Judges > Challenges to Judges

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Judicial Discretion

HN22[] **Judges, Challenges to Judges**

Military judges are presumed to know the law and to follow it absent clear evidence to the contrary.

Military & Veterans Law > ... > Courts Martial > Sentences > Presentencing Proceedings

HN23[] **Sentences, Presentencing Proceedings**

The test for an inappropriately severe sentence rests not on trial counsel's recommendation or speculation about the military judge's thought process, but is instead based on what the record reveals about the particular appellant, the nature and seriousness of the offenses, the appellant's record of service, and all matters contained in the record of trial.

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Record

Military & Veterans Law > ... > Courts Martial > Sentences > Execution & Suspension of Sentence

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Judge Advocate Review

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Waivers & Withdrawals of Appeals

HN24[] Judicial Review, Courts of Criminal Appeals

The general rule is that the Courts of Criminal Appeals may not consider anything outside of the entire record when reviewing a sentence under Unif. Code Mil. Justice art. 66(c). For purposes of Article 66, the "entire record" includes the record of trial and matters attached to the record in accordance with R.C.M. 1103(b)(2) and (3), Manual Courts-Martial, as well as briefs and arguments that government and defense counsel (and the appellant personally) might present regarding matters in the record of trial and allied papers.

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

Military & Veterans Law > ... > Courts Martial > Sentences > Cruel & Unusual Punishment

Military & Veterans Law > Military Justice > Judicial Review > US Court of Appeals for the Armed Forces

Military & Veterans Law > Military Justice > Apprehension & Restraint of Civilians & Military Personnel > Unlawful Restraint

Military & Veterans Law > ... > Courts Martial > Sentences > Maximum Limits

HN25[] Judicial Review, Courts of Criminal Appeals

In general, under Unif. Code Mil. Justice art. 66, *10 U.S.C.S. § 866*, the Courts of Criminal Appeals may not consider anything outside of the entire record when reviewing a sentence under Article 66(c). There are two exceptions to this rule. First, some of the United States Court of Appeals for the Armed Forces (CAAF) precedents have allowed the Courts of Criminal Appeals to supplement the record when deciding issues that are raised by materials in the record. Second, the CAAF has allowed appellants to raise and present evidence of claims of cruel and unusual punishment and violations of Unif. Code Mil. Justice art. 55, even though there was nothing in the record regarding those claims.

Military & Veterans Law > Military Justice > Apprehension & Restraint of Civilians & Military Personnel > Circumstances Warranting Confinement & Restraint

Military & Veterans Law > ... > Courts Martial > Sentences > Cruel & Unusual Punishment

Military & Veterans Law > Military Justice > Apprehension & Restraint of Civilians & Military Personnel > Unlawful Restraint

Military & Veterans Law > ... > Courts Martial > Sentences > Confinement

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN26[] Apprehension & Restraint of Civilians & Military Personnel, Circumstances Warranting Confinement & Restraint

The appellate court will review de novo whether the conditions of an appellant's confinement violate the *Eighth Amendment* or Unif. Code Mil. Justice art. 55.

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

Military & Veterans Law > ... > Courts Martial > Sentences > Confinement

Military & Veterans Law > ... > Courts Martial > Sentences > Cruel & Unusual Punishment

HN27[] Fundamental Rights, Cruel & Unusual Punishment

Both the *Eighth Amendment* and Unif. Code Mil. Justice art. 55 prohibit cruel and unusual punishment. In general, the court will apply the Supreme Court's interpretation of the *Eighth Amendment* to claims raised

under Article 55, except where legislative intent to provide greater protections under Article 55 is apparent. The *Eighth Amendment* prohibits two types of punishments: (1) those incompatible with the evolving standards of decency that mark the progress of a maturing society or (2) those which involve the unnecessary and wanton infliction of pain. To demonstrate that an appellant's confinement conditions violate the *Eighth Amendment*, an appellant must show: (1) an objectively, sufficiently serious act or omission resulting in the denial of necessities; (2) a culpable state of mind on the part of prison officials amounting to deliberate indifference to his health and safety; and (3) that he has exhausted the prisoner-grievance system and that he has petitioned for relief under Unif. Code Mil. Justice art. 138, *10 U.S.C.S. § 938*.

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

Military & Veterans Law > ... > Courts Martial > Sentences > Confinement

Military & Veterans Law > ... > Courts Martial > Sentences > Cruel & Unusual Punishment

Military & Veterans Law > ... > Courts Martial > Sentences > Maximum Limits

Military & Veterans Law > Military Justice > Apprehension & Restraint of Civilians & Military Personnel > Unlawful Restraint

HN28 **Fundamental Rights, Cruel & Unusual Punishment**

As for the Unif. Code Mil. Justice art. 55, *10 U.S.C.S. § 855*, prohibition on other cruel or unusual punishments, the court will apply the U.S. Supreme Court's interpretation of the *Eighth Amendment*.

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Actions by Convening Authority

Military & Veterans Law > ... > Courts Martial > Sentences > Reductions in Grade

Military & Veterans Law > ... > Courts Martial > Sentences > Fines & Forfeitures

Military & Veterans Law > Military Offenses > Categories of Offenses > Prejudicial to Discipline & Good Order

Military & Veterans Law > ... > Courts Martial > Sentences > Maximum Limits

HN29 **Posttrial Procedure, Actions by Convening Authority**

Unif. Code Mil. Justice art. 57(a)(2) authorizes a convening authority, upon application by the accused, to defer a forfeiture of pay or allowances or a reduction in rank until the date the convening authority takes action on the sentence. R.C.M. 1101(c)(3), Manual Courts-Martial, provides that an accused seeking to have a punishment deferred shall have the burden of showing that the interests of the accused and the community in deferral outweigh the community's interests in imposition of the punishment on its effective date. The rule outlines several factors which the convening authority may consider in determining whether to grant the request, including inter alia the nature of the offenses, the sentence adjudged, the effect of deferment on good order and discipline in the command, and the accused's character, mental condition, family situation, and service record.

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Actions by Convening Authority

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Record

Military & Veterans Law > ... > Courts Martial > Sentences > Execution & Suspension of Sentence

Military & Veterans Law > ... > Courts Martial > Sentences > Fines & Forfeitures

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Staff Judge Advocate Recommendations

HN30 **Posttrial Procedure, Actions by Convening Authority**

The appellate court will review a convening authority's denial of a deferment request for an abuse of discretion. R.C.M. 1101(c)(3), Manual Courts-Martial. When a

convening authority acts on an appellant's request for deferment of all or part of an adjudged sentence, the action must be in writing (with a copy provided to the appellant) and must include the reasons upon which the action is based. R.C.M. 1101(c)(3). If the request for deferment is denied, the basis for the denial should be in writing and attached to the record of trial.

Criminal Law & Procedure > ... > Standards of Review > Plain Error > Definition of Plain Error

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Judge Advocate Review

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Staff Judge Advocate Recommendations

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN31[] Plain Error, Definition of Plain Error

Failure to timely comment on matters in or attached to the staff judge advocate recommendation forfeits a later claim of error. The appellate court will analyze such forfeited claims for plain error. To prevail under a plain error analysis, an appellant must persuade the Court that: (1) there was an error; (2) it was plain or obvious; and (3) the error materially prejudiced a substantial right.

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Actions by Convening Authority

Military & Veterans Law > Military Justice > Courts Martial > Convening Authority

HN32[] Posttrial Procedure, Actions by Convening Authority

Judicial review is not an exercise based upon speculation, and the court will not permit convening authorities to frustrate the lawful responsibility of the military appellate courts.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Actions by Convening Authority

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Posttrial Sessions

Military & Veterans Law > Military Justice > Apprehension & Restraint of Civilians & Military Personnel > Speedy Trial

Military & Veterans Law > Military Justice > Courts Martial > Convening Authority

HN33[] Procedural Due Process, Scope of Protection

The appellate court will review de novo claims that an appellant has been denied the due process right to a speedy post-trial review and appeal. There is a presumption of facially unreasonable delay when the convening authority does not take action within 120 days of sentencing, when the case is not docketed with the Court of Criminal Appeals within 30 days of action, and when the Court of Criminal Appeals does not render a decision within 18 months of docketing. Where there is such a delay, the appellate court examine these four factors: (1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to timely review and appeal; and (4) prejudice to the appellant. No single factor is required for finding a due process violation and the absence of a given factor will not prevent such a finding.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Military & Veterans Law > Military Justice > Apprehension & Restraint of Civilians & Military Personnel > Speedy Trial

Military & Veterans Law > Military Justice > Judicial Review > US Court of Appeals for the Armed Forces

HN34[] Procedural Due Process, Scope of Protection

Where an appellant has not shown prejudice from the delay, there is no due process violation unless the delay is so egregious as to adversely affect the public's perception of the fairness and integrity of the military justice system. The United States Court of Appeals for the Armed Forces has identified three types of cognizable prejudice for purposes of an appellant's due process right to timely post-trial review: (1) oppressive incarceration; (2) anxiety and concern; and (3) impairment of the appellant's ability to present a defense at a rehearing.

Military & Veterans Law > Military Justice > Judicial Review > US Court of Appeals for the Armed Forces

HN35[] **Judicial Review, US Court of Appeals for the Armed Forces**

Where the appeal does not result in a rehearing on findings or sentence, an appellant's ability to present a defense at a rehearing is not impaired. As for anxiety and concern, the United States Court of Appeals for the Armed Forces has explained the appropriate test for the military justice system is to require an appellant to show particularized anxiety or concern that is distinguishable from the normal anxiety experienced by prisoners awaiting an appellate decision.

Counsel: For Appellant: Major Mark J. Schwartz, USAF; Captain David L. Bosner, USAF; Tami L. Mitchell, Esquire.

For Appellee: Lieutenant Colonel Brian C. Mason, USAF; Major Jessica L. Delaney, USAF; Major Peter F. Kellett, USAF; Mary Ellen Payne, Esquire.

Judges: Before J. JOHNSON, POSCH, and KEY, Appellate Military Judges. Chief Judge J. JOHNSON delivered the opinion of the court, in which Senior Judge POSCH and Judge KEY joined.

Opinion by: J. JOHNSON

Opinion

J. JOHNSON, Chief Judge:

A general court-martial composed of a military judge alone convicted Appellant, contrary to his pleas, of two specifications of committing lewd acts upon a child under the age of 12 years, in violation of *Article 120b, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920b*.[1],[2] The military judge sentenced Appellant to a dishonorable discharge, confinement for seven years, and reduction to the grade of E-1. The convening authority approved the adjudged sentence, but deferred automatic forfeitures of pay and allowances **[*2]** until action pursuant to *Articles 57(a)* and *58b*, UCMJ, *10 U.S.C. §§ 857(a)*, *858b*, and waived the automatic forfeitures for the benefit of Appellant's dependent child until the earlier of six months or the expiration of Appellant's term of service pursuant to *Article 58b, UCMJ*.

Appellant raises nine issues on appeal: (1) whether the evidence is legally and factually sufficient to support his convictions; (2) whether the finding of guilty with regard to Specification 3 of the Charge is fatally ambiguous; (3) whether the Government violated Appellant's right to equal access to evidence; (4) whether the military judge abandoned his impartial judicial role and erroneously failed to disqualify himself; (5) whether Appellant's sentence is inappropriately severe; (6) whether the Government's failure to defer and waive automatic forfeitures in accordance with the convening authority's direction warrants relief; (7) whether the Naval Consolidated Brig Miramar (Miramar Brig) policy of preventing Appellant from having contact with his minor son is unconstitutional or violates *Article 55, UCMJ, 10 U.S.C. § 855*; (8) whether the military judge abused his discretion in declining to admit a defense **[*3]** exhibit; and (9) whether the delay in procuring prescription eyeglasses for Appellant during his confinement constituted cruel and unusual punishment.[3] In addition, although not raised by Appellant, we consider two further issues: whether the convening authority's failure

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[1] All references in this opinion to the Uniform Code of Military Justice (UCMJ), Rules for Courts-Martial, and Military Rules of Evidence are to the *Manual for Courts-Martial*, *United States* (2016 ed.).

[2] The military judge found Appellant guilty of Specification 3 of the Charge by exceptions and substitutions. The military judge found Appellant not guilty of two specifications of sexual assault of a child under the age of 12 years in violation of *Article 120b, UCMJ*.

[3] Appellant personally raises issues (8) and (9) pursuant to *United States v. Grostefon, 12 M.J. 431 (C.M.A. 1992)*. We have carefully considered issues (8) and (9), and we find they warrant neither further discussion nor relief. *See United States v. Matias, 25 M.J. 356, 361 (C.M.A. 1987)*.

to state his reasons for denying Appellant's request to defer his reduction in grade warrants relief; and whether Appellant is entitled to relief for facially unreasonable appellate delay. We affirm the findings, but we find that an error with respect to the convening authority's denial of the requested deferment of the reduction in grade warrants relief with respect to the sentence.

I. BACKGROUND

Appellant met AS, then a divorced mother of three children, in June 2013 when they both lived in the state of Washington. They began dating, and Appellant moved in with AS and her children for a period of time before he departed for Air Force basic training in November 2013. Appellant and AS married in February 2014 after Appellant learned he would be stationed at Aviano Air Base (AB) in Italy. Appellant and AS moved to Italy in July 2014, and AS's children joined them there approximately one month later.

The family eventually **[*4]** settled in a four-story house in a town near Aviano AB. On weekends AS would regularly go to the on-base fitness center, a drive of approximately 30 minutes each way, leaving Appellant with the children, who were nine, five, and three years old at the time. AS noticed that Appellant seemed to favor the oldest child, her daughter JZ, over the other children. For example, Appellant bought clothes for JZ, helped her clean her room, and tucked her into bed at night without doing the same for the other children.

JZ exhibited troubling behavior after she arrived in Italy. She showed no motivation in the on-base school, which assigned a counselor to meet with JZ regularly. At home, JZ resisted bathing, she was aggressive toward her younger brother, and she would spend time alone in a dark room.

In Italy, AS's marriage to Appellant deteriorated. According to AS, the couple frequently argued about the children, finances, and managing the household. Tensions increased in January 2015 when Appellant traveled to Nellis Air Force Base (AFB), Nevada, for several weeks of training. While Appellant was there, AS informed him she did not want to continue the marriage. Soon afterwards, AS found JZ in **[*5]** her bedroom holding a tablet and crying. JZ asked AS to "take back" what she said to Appellant so they would not "have to go." AS looked at the tablet and discovered JZ had been messaging with Appellant via Facebook. AS did not inspect the messages at that point, but replied to Appellant's messages to the effect that he should not contact JZ.

Within a few days, AS inspected the messages more closely. Some of the messages alarmed her. At one point in these messages, JZ wrote, "And I still will not tell anybody," to which Appellant responded, "Good," before JZ finished her sentence, "About us!" Shortly thereafter, Appellant sent JZ messages asking if she knew how to delete Facebook messages before sending her instructions on how to do so. Later, JZ made cryptic references to the "last night with [Appellant]" when he was "doin the laundry," which "still haunt[ed]" her. JZ asked Appellant if he remembered "the laundry," to which Appellant responded that he did remember "[t]alking to [JZ] while doing laundry." JZ responded with a "thumbs up" symbol, to which Appellant responded with a winking emoji and "[t]hought so." Appellant and JZ shared that each missed the other and liked the other's **[*6]** smile. Coupled with JZ's troubling behavior, the messages led AS to believe that "there was something going on" and she "wanted it to be investigated." Although most of these electronic messages were later lost, AS printed a copy at the time.

AS took the messages to the Family Advocacy office at Aviano AB. Family Advocacy referred AS to the Air Force Office of Special Investigations (AFOSI). However, when the AFOSI interviewed JZ, she denied that Appellant had abused her, and the investigation ended.

AS and the children moved out of the house to stay with friends before Appellant returned from Nellis AFB, and the children never lived with Appellant again. According to AS, Appellant was uncooperative with AS's efforts to return to the United States, and he refused to provide adequate financial support until she sought assistance from his chain of command. As a result, AS sold most of the family's belongings in order to raise money, which caused further acrimony. AS and her children were eventually able to leave Italy and return to Washington; the divorce became final in March 2016.

In the months that followed their departure from Italy, JZ moved multiple times within Washington between **[*7]** her mother AS, her biological father, and her grandparents. By the beginning of 2017, JZ was 11 years old and again living with AS, who had remarried. Although AS had taken away JZ's tablet, JZ's school had provided her a laptop computer with Internet capability. In early 2017, AS learned that JZ had been communicating again via Facebook with Appellant, who was still stationed at Aviano AB. When confronted, JZ

initially denied communicating with Appellant, but soon JZ admitted that she had been doing so, and she permitted AS to read the messages. As AS and her husband reviewed the messages, JZ initially lay quietly on a couch before she covered her head with a blanket and began to cry.

The messages between Appellant and JZ ranged from mundane descriptions of daily activities, to false claims by JZ on such subjects as owning horses and being pregnant, to expressions of mutual affection and attraction. Appellant repeatedly commented that he felt a special bond with JZ, that he thought she was beautiful, and that he wanted to hold and kiss her. One notable early exchange included the following:

> [JZ:] remember when mom used to go to the gym on weekends and we would hang out
>
> [Appellant:] Yes **[*8]**
> [JZ:] do you remember what we did when we hung out
> [Appellant:] Yes
> Do you
> She didn't like me and you spending time together
> [JZ:] Yea I do
> Did she know?!
> [Appellant:] Idk what you told her or what she thinks she knows
> I didn't say anything about hanging out
> We watched movies
> [JZ:] I said the same thing

In later messages, Appellant implied and then expressed his purported sexual attraction to JZ more openly. Appellant told JZ he thought about sex often, had thought about having sex with JZ, and would be willing to have sex with her when she was older, because "that's the legal answer." When JZ told Appellant she would kiss and marry Appellant if she was his age, he responded that JZ was "gorgeous, smart and fun," and he would kiss and marry her too if they were the same age. Later, Appellant told JZ he could "teach [her] a thing or two" about sex "when she was ready to learn." When JZ asked Appellant if he would send her a picture of his "you know what" if she asked him to, Appellant responded that he "would if [JZ] sent one back." JZ replied that she "would send one" when she was "alone," to which Appellant responded "Damn," "Same." When JZ asked Appellant "on a scale of 1-10 how bad do you **[*9]** want to have sex with me," Appellant told her the answer was ten; JZ responded "same." Then the following exchange ensued:

> [JZ:] I am being for real with this one...It honestly SUCKS that we cant have sex till im 18
> [Appellant:] Yeah
> Well I think it's 17 with consent
> If you really wanted to
> [JZ:] yeah
> [Appellant:] But 18 is just safer
> [JZ:] yep for sure
> [Appellant:] Does suck
> [JZ:] yea
> if you REALLY wanted to... would you have sex while it is still illegal just questioning
> [Appellant:] Maybe
> But it's better when you are of age
> [JZ:] yup
> [Appellant:] Just because it can still come back on me
> [JZ:] yea it can
> [Appellant:] That's why I said maybe because it's not yes but it's not saying no
> [JZ:] true true
> [Appellant:] Wish you were of age now

Later, Appellant and JZ joked about JZ taking her pants and underwear off when she came to visit him sometime. When Appellant dared her to do so, JZ asked "Why? What will you do if I do?" Appellant responded, "Idk," "That's hot though." At another point, Appellant suggested JZ might secretly meet Appellant when he came to Washington to visit his father.

Perceiving that some of the messages were sexual in nature, AS asked JZ if Appellant had done anything to her physically **[*10]** while they were in Italy. JZ replied that Appellant had. The following morning AS took JZ to the civilian police in Washington, who began an investigation and contacted the AFOSI.

At trial, JZ testified *inter alia* that Appellant touched her inappropriately when they lived together in Italy.[4] According to JZ, on multiple occasions when AS was at the gym, Appellant brought JZ to the laundry room while her brother and sister were upstairs watching movies. In the laundry room, Appellant put her on top of the dryer or washing machine and put his hands underneath her shirt. She further testified that "sometimes" he would also pick her up and hold her by her "butt" against the front of his body, and sometimes he "wrapped his hands around [her] waist." JZ further testified that on multiple occasions when AS was away from the house Appellant took JZ to JZ's bedroom, which like the laundry room was on the bottom floor. According to JZ, in the bedroom Appellant inserted his fingers and his tongue in

[4] JZ was 13 years old at the time of Appellant's trial.

her vagina as she lay on the bed.

The military judge found Appellant guilty of one specification of committing lewd acts on JZ by communicating indecent language to her on divers occasions with the intent **[*11]** to gratify his sexual desire, and one specification of committing a lewd act on JZ by "putting his arms around [JZ], and intentionally touching and holding onto her buttocks with his hands, with an intent to gratify his sexual desire." The military judge found Appellant not guilty of one specification of sexual assault against JZ by penetrating her vulva with his fingers and one specification of sexual assault by penetrating her vulva with his tongue, both with the intent to gratify his sexual desire.

II. Discussion

A. Legal and Factual Sufficiency

1. Law

HN1[] We review issues of legal and factual sufficiency de novo. *United States v. Washington, 57 M.J. 394, 399 (C.A.A.F. 2002)* (citation omitted). Our assessment of legal and factual sufficiency is limited to the evidence produced at trial. *United States v. Dykes, 38 M.J. 270, 272 (C.M.A. 1993)* (citations omitted).

HN2[] "The test for legal sufficiency is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Robinson, 77 M.J. 294, 297-98 (C.A.A.F. 2018)* (citation omitted). "[I]n resolving questions of legal sufficiency, we are bound to draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Barner, 56 M.J. 131, 134 (C.A.A.F. 2001)* (citations omitted). As a result, "[t]he standard **[*12]** for legal sufficiency involves a very low threshold to sustain a conviction." *United States v. King, 78 M.J. 218, 221 (C.A.A.F. 2019)* (alteration in original) (citation omitted).

HN3[] The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [we are] convinced of the [appellant]'s guilt beyond a reasonable doubt." *United States v. Turner, 25 M.J. 324, 325 (C.M.A. 1987)*. "In conducting this unique appellate role, we take 'a fresh, impartial look at the evidence,' applying 'neither a presumption of innocence nor a presumption of guilt' to 'make [our] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt.'" *United States v. Wheeler, 76 M.J. 564, 568 (A.F. Ct. Crim. App. 2017)* (alteration in original) (quoting *Washington, 57 M.J. at 399*), *aff'd*, *77 M.J. 289 (C.A.A.F. 2018)*.

Article 120b(c), UCMJ, provides: "Any person subject to this chapter who commits a lewd act upon a child is guilty of sexual abuse of a child and shall be punished as a court-martial may direct." *Manual for Courts-Martial, United States* (2016 ed.) (*MCM*), pt. IV, ¶ 45b.a.(c). A "child" is "any person who has not attained the age of 16 years." *MCM*, pt. IV, ¶ 45b.a.(h)(4). *HN4*[] The term "lewd act" includes, *inter alia*, "any sexual contact with a child" and "intentionally communicating **[*13]** indecent language to a child by any means, including via any communication technology, with an intent to . . . arouse or gratify the sexual desire of any person." *MCM*, pt. IV, ¶ 45b.a.(h)(5). "'Indecent' language is that which is grossly offensive to modesty, decency, or propriety, or shocks the moral sense, because of its vulgar, filthy, or disgusting nature, or its tendency to incite lustful thought. Language is indecent if it tends reasonably to corrupt morals or incite libidinous thoughts." *MCM*, pt. IV, ¶ 89.c. "Sexual contact" includes "any touching . . . either directly or through the clothing, [of] any body part of any person, if done with an intent to arouse or gratify the sexual desire of any person." *MCM*, pt. IV, ¶ 45.a.(g)(2); *see MCM*, pt. IV, ¶ 45b.a.(h)(1).

2. Analysis

Appellant asserts the evidence was legally and factually insufficient to support his conviction for either specification for which the military judge found him guilty. We consider each specification in turn.

a. Intentionally Communicating Indecent Language

On appeal, Appellant does not contest that he in fact sent the messages in question to JZ, that he did so intentionally, or that he knew JZ's age. *HN5*[] With respect **[*14]** to the content of the messages, the indecency of a communication depends on "the context in which it is made." *United States v. Green, 68 M.J. 266, 270 (C.A.A.F. 2010)* (citation omitted). In this case,

Appellant communicated to an 11-year-old child that he thought about sex a lot, that he desired to have sexual intercourse with her in the future, that his sexual desire for her was a ten out of ten, that it "sucked" that they could not have sex before she was 17 or 18 years old, and that he would "maybe" have sex with her earlier even if it was illegal. In addition, he discussed—albeit hypothetically—sending a photo of his genitals to JZ in return for a photo of hers. The context for these communications included, as the military judge found, that Appellant had previously touched JZ's buttocks and torso with the intent to gratify his sexual desire, when she was only nine years old and he was her stepfather. We find Appellant sent JZ messages that were "grossly offensive to modesty, decency, or propriety," and therefore indecent. *MCM*, pt. IV, ¶ 89.c.

Without conceding indecency, Appellant contends for purposes of argument that even if we find some of his later messages were indecent, there is insufficient evidence of his intent to gratify **[*15]** his sexual desire, because he told JZ they should wait until she was 18 years old to have sex. We disagree and find ample evidence that Appellant intended to gratify his sexual desire at the time he sent the messages. Again, the context for these messages included that Appellant had touched JZ's body for the purpose of gratifying his sexual desire when they lived in Italy. The nature of the messages and Appellant's comments suggest he found his communications with JZ sexually stimulating. If there were any doubt, his comment that he found contemplating JZ removing her pants and underwear when she visited him to be "hot" would lay it to rest.

b. Sexual Contact

With respect to the specification that Appellant committed sexual contact on JZ by putting his arms around her and putting his hands on her buttocks with the intent to gratify his sexual desire, Appellant contends JZ's testimony is simply not credible enough to sustain his conviction. In fact, there are significant problems with JZ's credibility. She was reluctant to testify about certain events, notably the sexual acts Appellant allegedly performed on her in her bedroom in Italy. Her testimony was sometimes confusing and incomplete, **[*16]** requiring the counsel and military judge to readdress the same events with her multiple times. More significantly, by her own admission JZ lied about many things from 2015 to 2017. She often lied in her 2017 messages to Appellant about owning horses and having a boyfriend, and she lied to Appellant and others about being pregnant; according to JZ, she did so to get "attention." More problematically, JZ admitted that she had lied to investigators about Appellant's offenses. She lied to the AFOSI in 2015 when she denied Appellant had touched her inappropriately, because she was "young, dumb, and [she] thought [she] would get in trouble." JZ admitted she lied to the civilian police in 2017 when she told them she kicked Appellant when he was touching her, and when she claimed at one point Appellant had threatened to kill her mother AS. JZ testified she did not know why she told these lies. JZ told the military judge she understood it was important to tell the truth in her courtroom testimony, and she indicated she had put her "lying ways" behind her; however, when the military judge asked JZ why he should believe what she said about Appellant when she had "said so many lies in the past," **[*17]** she responded "I don't have an answer to that."

The military judge evidently recognized JZ's credibility problems. He questioned her directly about the importance of telling the truth and confronted her about her admitted past false statements. Notably, after both parties rested the military judge recalled JZ to give further testimony. Among other questions, the military judge focused JZ on "the first time" Appellant touched JZ, which she confirmed was in the laundry room. JZ described again how Appellant picked her up and put her on the washing machine or dryer. Then Appellant put his hands "in [her] shirt" and "around [her] waist." At another point, he "picked [her] up and held [her] by the butt." She explained:

> So you know how like you hold like a little kid off to the side or like you're holding someone and you kind of like hold them kind of like by the thigh I guess. He had his hands like around my butt.
>
> . . . .
>
> I think he was lifting me off of whatever I was sitting on. And he had picked me up and he was holding me by the butt. And then instead of like having me off to the side kind of on his hip, he kind of had me in front of him.

The military judge found Appellant not guilty of **[*18]** the alleged sexual acts in JZ's bedroom. However, he found Appellant guilty of one instance of alleged sexual contact in the laundry room, in accordance with JZ's recall testimony. Significantly, unlike the alleged bedroom incidents, JZ's contemporary messages to Appellant in 2015 corroborated that something significant occurred between her and Appellant in the laundry room. In addition, her testimony regarding this incident was more certain, specific, and definite than her

description of the bedroom incidents. We are also cognizant that the military judge observed JZ's testimony and evidently carefully considered her credibility. Coupled with Appellant's response of "good" when JZ promised not to "tell anybody" about them in 2015, Appellant immediately sending instructions on how to delete Facebook messages, and other evidence of Appellant's sexual interest in JZ, we conclude the evidence supports the military judge's findings.

c. Conclusion as to Legal and Factual Sufficiency

Drawing every reasonable inference from the evidence of record in favor of the Government, we conclude the evidence was legally sufficient to support Appellant's convictions for sexual abuse of a child by communicating **[*19]** indecent language and by sexual contact. *See* Robinson, 77 M.J. at 297-98. Additionally, having weighed the evidence in the record of trial and having made allowances for not having personally observed the witnesses, we are convinced of Appellant's guilt beyond a reasonable doubt. *See* Turner, 25 M.J. at 325.

B. Ambiguous Finding

1. Additional Background

Specification 3 of the Charge alleged that Appellant:

> [D]id, at or near Fanna, Italy, *on divers occasions*, between on or about 7 August 2014 and on or about 21 January 2015, commit lewd acts upon [JZ], a child who had not attained the age of 12 years, to wit: intentionally touching her buttocks with his hands, with an intent to gratify his sexual desire.

(Emphasis added).

JZ's initial testimony indicated Appellant touched her on her buttocks and elsewhere multiple times in the laundry room. As described above, after both parties had rested, the military judge exercised his authority under Article 46, UCMJ, 10 U.S.C. § 846, to recall JZ for additional testimony. During that recall testimony, the military judge had JZ focus on "the first time" Appellant touched JZ, which JZ confirmed was in the laundry room. JZ again described how Appellant put his arms around her and held her by her buttocks on that occasion. **[*20]**

The military judge found Appellant guilty of Specification 3 by exceptions and substitutions. According to the modified specification, the military judge found that Appellant:

> [D]id, at or near Fanna, Italy, in the laundry room of the family home, on the day of the first alleged touching incident, between on or about 7 August 2014 and on or about 21 January 2015, commit a lewd act upon [JZ], a child who had not attained the age of 12 years, to wit: putting his arms around [JZ], and intentionally touching and holding onto her buttocks with his hands, with an intent to gratify his sexual desire.

2. Law

HN6[] "Whether a verdict is ambiguous and thus precludes a [Court of Criminal Appeals] from performing a factual sufficiency review is a question of law reviewed de novo." United States v. Ross, 68 M.J. 415, 417 (C.A.A.F. 2010) (emphasis and citation omitted).

HN7[] "One or more words or figures may be excepted from a specification, and, when necessary, others substituted, if the remaining language of the specification, with or without substitutions, states an offense by the accused which is punishable by court-martial." United States v. Trew, 68 M.J. 364, 367 (C.A.A.F. 2010) (quoting Rule for Courts-Martial (R.C.M.) 918(a)(1), Discussion).

HN8[] "[W]hen the phrase 'on divers occasions' is removed from a specification, the effect is that 'the accused has been **[*21]** found guilty of misconduct on a single occasion and not guilty on the remaining occasions.'" United States v. Wilson, 67 M.J. 423, 428 (C.A.A.F. 2009) (quoting United States v. Augspurger, 61 M.J. 189, 190 (C.A.A.F. 2005)). "If there is no indication on the record which of the alleged incidents forms the basis of the conviction, then the findings of guilt are ambiguous and the Court of Criminal Appeals cannot perform a factual sufficiency review." *Id.* (citing United States v. Walters, 58 M.J. 391, 396-97 (C.A.A.F. 2003)). "[T]he remedy for a *Walters* violation is to set aside the finding of guilty to the affected specification and dismiss it with prejudice." United States v. Scheurer, 62 M.J. 100, 112 (C.A.A.F. 2005) (footnote omitted).

3. Analysis

Appellant was charged with intentionally touching JZ's

buttocks on divers occasions. The military judge excepted the "on divers occasions" language and found Appellant guilty of touching JZ on only a single occasion, "on the day of the first alleged touching incident" which occurred "in the laundry room." By specifying in the substituted language the single occasion for which he was finding Appellant guilty, the military judge ensured the record indicated which alleged incident formed the basis of the conviction, and thereby avoided a fatally ambiguous finding.

Appellant contends the finding is nevertheless fatally ambiguous because the military judge did not identify the date **[*22]** on which he found the unlawful touching occurred. However, we find nothing in *Walters* or its progeny that requires that a date be used to "reflect the specific instance of conduct upon which [the] modified findings are based." *Walters, 58 M.J. at 396*. In many cases, a witness may provide testimony of sufficient strength to prove guilt beyond reasonable doubt, yet be unable to recall the date of the event with any specificity. In this case, JZ testified specifically to Appellant's actions on the first occasion that he touched her in the laundry room, and the military judge made clear that single identifiable incident was the basis for his non-divers findings. That is an adequate indication for this court to perform its factual sufficiency review, and it is what *Walters* requires.

C. Equal Access to Evidence

1. Additional Background

At trial, AS testified that when she discovered the first exchange of Facebook messages between Appellant and JZ in 2015, she made screenshots of messages on JZ's Facebook account. AS then emailed these screenshots to herself, printed them out, and provided these printouts to the Family Advocacy office and to the AFOSI at Aviano AB. After AS discovered Appellant's second Facebook exchange **[*23]** with JZ in 2017, she found that the 2015 conversation had been deleted. However, she still had her email to herself from 2015.

At the conclusion of AS's direct examination, trial defense counsel informed the military judge that this was the first time they had learned about her email to herself, which the Defense had not received in discovery, although they had received the screenshots of the messages. Trial defense counsel stated the Defense would not be prepared to cross-examine AS "until we get that discovery from the government." Senior trial counsel explained the email had not been turned over because it was not in the possession of the Government; AS had accessed the email herself. The military judge recessed the court-martial for 43 minutes in order for AS to provide the email to the parties. Trial defense counsel then proceeded with cross-examination without further delay.

Subsequently, Special Agent (SA) IP of the AFOSI testified regarding various steps he took to investigate the case. On cross-examination, senior trial defense counsel asked SA IP whether he had attempted to download JZ's entire Facebook profile. SA IP testified that he had, through a process offered by Facebook **[*24]** itself which he described as a "dump" of "every single piece of information or activity that [JZ] ever did on Facebook."[5] However, SA IP testified he did not review the entire "dump." He began to review the chat portion, but found "it was hard to tell who [was] sending and who was receiving the messages, because instead of having a name, you had a number." As a result, SA IP decided to rely on screenshots or "snippets" that the agents created from the messages displayed onscreen, because those "would be a good representation of what the communication was." However, these screenshots would not have included any deleted messages. SA IP did not know if the "dump" would have included deleted messages.

In response to questions from the military judge, SA IP testified that as of Appellant's trial, AFOSI no longer had the Facebook "dump." He explained that he "never saved it out of the computer that we have, and that computer was giving us a lot of issues and basically broke down a couple of times, and the information was lost." SA IP further testified that the AFOSI could obtain another "dump" from Facebook, but indicated he had not done so because the report of investigation had been closed **[*25]** and delivered to the legal office, which had not made such a request.

At no point during the trial did trial defense counsel object that they had been unaware of the Facebook "dump," request that the Government obtain another "dump," or allege any discovery or production violation or seek any other remedy with respect to the "dump."

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[5] On redirect examination, SA IP explained that AS had provided oral and written consent for the Facebook "dump," although he understood the scope was limited to Facebook messages between Appellant and JZ.

2. Law

HN9[] "[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963)*. The United States Supreme Court has extended *Brady*, clarifying "that the duty to disclose such evidence is applicable even though there has been no request by the accused . . . and that the duty encompasses impeachment evidence as well as exculpatory evidence." *Strickler v. Greene, 527 U.S. 263, 280, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999)*; *see United States v. Claxton, 76 M.J. 356, 359 (C.A.A.F. 2017)*.

HN10[] "A military accused also has the right to obtain favorable evidence under [*Article 46, UCMJ*] . . . as implemented by R.C.M. 701-703." *United States v. Coleman, 72 M.J. 184, 186-87 (C.A.A.F. 2013)* (footnotes omitted). *Article 46, UCMJ*, and these implementing rules provide a military accused statutory discovery rights greater than those afforded by the United States Constitution. *See id. at 187* (additional citation omitted) (citing *United States v. Roberts, 59 M.J. 323, 327 (C.A.A.F. 2004)*). With **[*26]** respect to discovery, R.C.M. 701(a)(2)(A) requires the Government, upon defense request, to permit the inspection of, *inter alia*, any documents "within the possession, custody, or control of military authorities, and which are material to the preparation of the defense . . . ." With respect to production, each party is entitled to the production of evidence which is relevant and necessary. R.C.M. 703(f)(1); *United States v. Rodriguez, 60 M.J. 239, 246 (C.A.A.F. 2004)* (citation omitted). Evidence is relevant if "it has any tendency to make a fact more or less probable than it would be without the evidence" and "is of consequence in determining the action." Mil. R. Evid. 401. "Relevant evidence is 'necessary when it is not cumulative and when it would contribute to a party's presentation of the case in some positive way on a matter in issue.'" *Rodriguez, 60 M.J. at 246* (quoting R.C.M. 703(f)(1), Discussion).

HN11[] Each party to a court-martial must have an equal opportunity to inspect evidence and to obtain witnesses and other evidence. *United States v. Stellato, 74 M.J. 473, 483 (C.A.A.F. 2015)* (citing R.C.M. 701(e); *Article 46, UCMJ*). The United States Court of Appeals for the Armed Forces (CAAF) "has interpreted this requirement to mean that the 'Government has a duty to use good faith and due diligence to preserve and protect evidence and make it available to an accused.'" *Id.* (quoting *United States v. Kern, 22 M.J. 49, 51 (C.M.A. 1986)*). "The duty to preserve **[*27]** includes: (1) evidence that has an apparent exculpatory value and that has no comparable substitute; (2) evidence that is of such central importance to the defense that it is essential to a fair trial; and (3) statements of witnesses testifying at trial." *Id.* (citations omitted).

HN12[] A party's failure to move to compel discovery or for production of witnesses or evidence before pleas are entered constitutes waiver. R.C.M. 905(b)(4); R.C.M. 905(e); *see United States v. Hardy, 77 M.J. 438, 440-42 (C.A.A.F. 2018)* (citations omitted) (concluding that where R.C.M. 905(e) refers to "waiver" it means "waiver" rather than forfeiture).

3. Analysis

Appellant's assignment of error raises three potential issues with respect to discovery and preservation of evidence related to JZ's Facebook account: (1) the Defense's access to the account; (2) the Government's failure to preserve data in the account; and (3) the Government's failure to preserve the information "dump" SA IP obtained from Facebook. We consider each issue in turn.

On appeal, Appellant contends the Government violated his right to equal access to JZ's Facebook account. We generally agree with Appellant that the AFOSI's continued access to JZ's Facebook account during the investigation and trial brought it within the Government's control for **[*28]** purposes of discovery under R.C.M. 701(a). *See Stellato, 74 M.J. at 484-85* (footnotes omitted). However, we find no support for Appellant's claim that "the [D]efense was never provided access to JZ's Facebook account, or with any opportunity to inspect her Facebook account and to independently verify the authenticity of the messages between JZ and Appellant." What is clear is that, with the possible exception of trial defense counsel's objection to not receiving AS's email to herself from 2015, the Defense never moved to compel discovery or production of this evidence, either before entry of pleas or after. Accordingly, under R.C.M. 905(b)(4), R.C.M. 905(e), and *Hardy*, Appellant waived the purported denial of access he seeks to raise on appeal.

Appellant also suggests the Government failed in its

duty to preserve evidence from JZ's Facebook account. He contends it is possible that either AS or JZ could have accessed the account and deleted certain messages, distorting the context and meaning of the apparent exchanges between Appellant and JZ. He notes the AFOSI failed to subpoena Facebook records, obtain a forensic analysis of the account, or seize Appellant's own electronic devices and any evidence therein. However, there is no indication Appellant **[*29]** requested such a subpoena or production of such a forensic analysis, and Appellant presumably had access to his own Facebook account and electronic devices. Trial defense counsel certainly could, and did, comment in closing argument on alleged deficiencies in the investigation. However, the Defense waived any purported discovery or production violations by failing to move for relief at trial.

We acknowledge the AFOSI's failure to preserve the "dump" of JZ's Facebook account had the potential to violate the Government's obligation to exercise "good faith and due diligence to preserve and protect evidence and make it available to an accused." *Stellato, 74 M.J. at 483* (quoting *Kern, 22 M.J. at 51*). The fact that SA IP found the report hard to read does not negate its potential significance for the trial. However, once again, the Defense failed to move to compel or seek relief as a result of the loss of the "dump," waiving the issue. On appeal, Appellant argues "the record suggests that the 'dump' did not become known to defense counsel until [SA] IP's testimony." However, the Defense made no such claim at trial, and we find the record suggests the Defense was not at all surprised by this testimony. Senior trial defense counsel **[*30]** specifically asked SA IP whether he had attempted to download JZ's entire Facebook profile, which led directly to SA IP's testimony regarding the "dump"—strongly suggesting this had been covered in pretrial interviews. In notable contrast to AS's testimony about her email in 2015, the Defense made no objection, complaint, or expression of surprise. At no point did the Defense move for a sanction against the Government, or request a replacement "dump" after SA IP testified in response to the military judge's questioning that such a request was possible.

HN13[↑] In general, a valid waiver leaves no error to correct on appeal. *United States v. Davis, 79 M.J. 329, 331 (C.A.A.F. 2020)* (quoting *United States v. Campos, 67 M.J. 330, 332 (C.A.A.F. 2009)*). We recognize our authority pursuant to *Article 66, UCMJ, 10 U.S.C. § 866*, to pierce waiver in order to correct a legal error in the proceedings. *See Hardy, 77 M.J. at 443*. Assuming *arguendo* the AFOSI's failure to preserve the "dump" was an error, we decline to pierce Appellant's waiver in this case. There is no indication the Defense was surprised by SA IP's testimony. Trial defense counsel made no objection and sought no relief. Instead, in closing argument trial defense counsel referred to the AFOSI's failure to review the "dump" in order to impugn the quality of the investigation. Accordingly, **[*31]** we find this assignment of error warrants no relief.

D. Impartiality of the Military Judge

1. Law

HN14[↑] We review a military judge's decision not to recuse himself for an abuse of discretion. *See United States v. Sullivan, 74 M.J. 448, 454 (C.A.A.F. 2015)*. "A military judge abuses his discretion when: (1) the findings of fact upon which he predicates his ruling are not supported by the evidence of record; (2) if incorrect legal principles were used; or (3) if his application of the correct legal principles to the facts is clearly unreasonable." *United States v. Ellis, 68 M.J. 341, 344 (C.A.A.F. 2010)* (citing *United States v. Mackie, 66 M.J. 198, 199 (C.A.A.F. 2008))*. However, "[w]hen an appellant . . . does not raise the issue of disqualification until appeal, we examine the claim under the plain error standard of review." *United States v. Martinez, 70 M.J. 154, 157 (C.A.A.F. 2011)* (citing *United States v. Jones, 55 M.J. 317, 320 (C.A.A.F. 2001))*. "Plain error occurs when (1) there is error, (2) the error is plain or obvious, and (3) the error results in material prejudice." *Id.* (citing *United States v. Maynard, 66 M.J. 242, 244 (C.A.A.F. 2008))*.

HN15[↑] "An accused has a constitutional right to an impartial judge." *United States v. Wright, 52 M.J. 136, 140 (C.A.A.F. 1999)* (citations omitted). R.C.M. 902 governs disqualification of the military judge. R.C.M. 902(b) sets forth five specific circumstances in which a "military judge shall disqualify himself or herself." In addition, R.C.M. 902(a) requires disqualification "in any proceeding in which th[e] military judge's impartiality might reasonably be questioned." Disqualification **[*32]** pursuant to R.C.M. 902(a) is determined by applying an objective standard of "whether a reasonable person knowing all the circumstances would conclude that the military judge's impartiality might reasonably be questioned." *Sullivan, 74 M.J. at 453* (citing *Hasan v. Gross, 71 M.J. 416, 418 (C.A.A.F. 2012))*.

HN16[↑] "There is a strong presumption that a judge is

impartial, and a party seeking to demonstrate bias must overcome a high hurdle . . . ." *United States v. Quintanilla, 56 M.J. 37, 44 (C.A.A.F. 2001)* (citation omitted). A military judge "should not leave [a] case 'unnecessarily.'" *Sullivan, 74 M.J. at 454* (quoting R.C.M. 902(d)(1), Discussion). "Although a judge has a duty not to sit when disqualified, the judge has an equal duty to sit on a case when not disqualified." *United States v. Witt, 75 M.J. 380, 383 (C.A.A.F. 2016)* (citing *Laird v. Tatum, 409 U.S. 824, 837, 93 S. Ct. 7, 34 L. Ed. 2d 50 (1972))*.

HN17[↑] "[A] military judge must not become an advocate for a party but must vigilantly remain impartial during the trial." *United States v. Ramos, 42 M.J. 392, 396 (C.A.A.F. 1995)*. However, "a military judge is not 'a mere referee' but, rather, properly may participate actively in the proceedings." *Id.* (quoting *United States v. Graves, 23 C.M.A. 434, 1 M.J. 50, 53, 50 C.M.R. 393 (C.M.A. 1975))*. "Thus, while a military judge must maintain his fulcrum position of impartiality, the judge can and sometimes must ask questions in order to clear up uncertainties in the evidence or to develop the facts further." *Id.* (citations omitted); *see also* Mil. R. Evid. 614 (permitting the military judge to call and examine witnesses).

2. Analysis

On appeal, Appellant contends **[*33]** that "[t]hroughout the trial, the military judge assisted the Government in proving its case," which created a disqualifying appearance of bias under R.C.M. 902(a). Appellant cites several instances, including *inter alia* occasions on which the military judge: explained why he was sustaining a defense objection to a question calling for speculation and suggested a different line of questioning; interrupted trial defense counsel's cross-examination of JZ to ask his own clarifying questions; encouraged trial defense counsel to move on from an unsuccessful effort to impeach AS's testimony on cross-examination; questioned JZ about her memory of sending Facebook messages in 2015 in response to a defense objection to the admission of those messages; and interrupted trial counsel's direct examination of JZ to ask his own questions. In addition, Appellant cites two other incidents that warrant more detailed explanation.

First, during the direct examination of JZ, senior trial counsel offered Prosecution Exhibit 5, which was a copy of Facebook messages between Appellant and JZ from 2017. Senior trial defense counsel objected on the basis of authenticity and foundation. In response, senior trial counsel argued **[*34]** JZ had laid an adequate foundation because she "indicated familiarity with the conversation that's captured in the exhibit." In response to questioning by the military judge, senior trial counsel acknowledged the exhibit had been created at the AFOSI detachment. The military judge suggested that JZ's testimony was inadequate to authenticate all 261 pages of the exhibit. When senior trial counsel proposed to "ask [JZ] some additional questions to clarify how a conversation went on for a month," the military judge responded:

> I will just tell you, it would be a lot more helpful for me, maybe this is a hint, if you can bring in an [AFOSI] agent, who took these pictures and told me this is from her Facebook account or [Appellant's] Facebook account and this is what we downloaded with regard to their conversation, then I have [JZ] saying yes, we did converse during that month . . . . That's the stuff that's going to help me, but I need to know this is truly the conversation that she had with [Appellant]. She has a memory and I am sure you are going to get to that, what she remembers. I think you're going to need that, but if you want to admit this document, then I need to know where it came **[*35]** from, from somebody, besides [JZ], because she can't remember this entire document. That's what I'm dealing with so, just so I lay it all out on the table, that is my problem.

The military judge then conditionally admitted Prosecution Exhibit 5, pending testimony from a witness who could testify to where the exhibit "came from." The exhibit was ultimately admitted without further objection, following the testimony of the agent and the paralegal who created the images.

The second incident that warrants explanation occurred after the Government recalled AS for additional testimony. Trial defense counsel cross-examined AS about whether she remembered reading certain messages from JZ to Appellant. Senior trial counsel objected to a question on the basis of "improper impeachment." When the military judge asked about the basis, senior trial counsel explained that trial defense counsel's question implied the messages were written in a particular order, although that order had not been established by AS's testimony. In response, the military judge stated:

> Okay. That is not lost on the court, and you get to come up and ask redirect. This is cross-examination. If defense counsel wants to

> portray **[*36]** or use their questions to try to trick a witness, that is not lost on the court and it's obviously not lost on you. So, when you get back up, you can clarify. I personally don't think it makes defense counsel look good when they are trying to do that, because I'm trying to understand what's going on. So, shoving words into people's mouths doesn't necessarily help me, but it is cross-examination and that is what he is permitted to do.

Senior trial counsel responded, "Understood, Your Honor." The military judge then added, "And sometimes, [the cross-examination] is very successful in what it gets out. So, enough of the speech. I am overruling the objection." Trial defense counsel then continued with cross-examination.

Appellant did not raise the issue of the military judge's disqualification at trial. ***HN18***[↑] Accordingly, we review the military judge's decision not to disqualify himself *sua sponte* for plain error. *See* *Martinez, 70 M.J. at 157* (citation omitted). Several factors contribute to our conclusion that the military judge did not commit a plain or obvious error.

HN19[↑] First, "[f]ailure to object at trial to alleged partisan action on the part of a military judge may present an inference that the defense believed that **[*37]** the military judge remained impartial." *United States v. Foster, 64 M.J. 331, 333 (C.A.A.F. 2007)* (citation omitted). We find trial defense counsel's failure to raise the issue at trial to be some indication that the Defense did not believe the military judge was, or appeared to be, biased in favor of the Government.

Second, the military judge also directed explanatory comments on evidence to the Defense. In particular, at one point the military judge assisted senior defense counsel in responding to trial counsel's objection to an exhibit the Defense sought to introduce. Thus, the military judge exhibited a tendency to facilitate the introduction of relevant evidence, regardless of which party was the proponent.

Third, it is highly significant that Appellant elected to be tried by the military judge alone. There were no court members present to observe and potentially be influenced by the manner in which the military judge interacted with the parties. Moreover, as the trier of fact, the military judge had an equal right to the parties to seek evidence, call witnesses, and ask questions. *See* *10 U.S.C. § 846(a)*. To the extent the military judge, at times, steered counsel toward witnesses and lines of questioning that the military judge believed would be useful, **[*38]** the fact that the military judge could have called the witnesses and asked the questions himself greatly mitigates any perception of a desire to assist one side or another.

We find most of the military judge's actions that the Appellant complains of on appeal to be relatively innocuous, particularly in a judge-alone trial. The military judge was not shy about interjecting to ask his own questions of witnesses or share his thoughts with counsel, but this was generally in aid of developing the evidence in his role as the trier of fact. The fact that the evidence he developed in doing so tended to be helpful to one party or another does not, in itself, evince partiality. *See, e.g.*, *United States v. Acosta, 49 M.J. 14, 17-18 (C.A.A.F. 1998)* (finding no appearance of partiality in a court-martial with members despite the military judge asking questions that "eviscerated [the] appellant's defense of entrapment").

The military judge's comments to senior trial counsel regarding laying a foundation for Prosecution Exhibit 5 warrant an additional comment. In light of the military judge's duty to remain vigilantly impartial, and to appear so, the military judge's suggestion that he was giving a "hint" to the Government as to how to introduce evidence **[*39]** was ill-advised. An observer might interpret such a term to mean the military judge was choosing to assist one of the parties, despite his authority to call witnesses and ask questions himself. Nevertheless, we find that this comment, in the context of the entire trial, would not cause a reasonable observer with knowledge of all the circumstances to doubt the strong presumption the military judge was impartial.

Similarly, we find the military judge's suggestion that trial defense counsel's cross-examination of AS was "shoving words" into her mouth, which did not make the Defense "look good," also does not breach the presumption of impartiality. ***HN20***[↑] "[J]udicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge." *Liteky v. United States, 510 U.S. 540, 555, 114 S. Ct. 1147, 127 L. Ed. 2d 474 (1994)*. The military judge's comments do not suggest hostility toward the Defense, but merely some criticism toward trial defense counsel's cross-examination tactics. Moreover, immediately afterwards the military judge acknowledged such tactics could sometimes be effective, and then overruled the Government's objection. In addition, the context for **[*40]** this

comment was not a tirade against the Defense, but an explanation to senior trial counsel as to why her objection to the Defense's questioning was ill-founded. Again, in the context of the entire trial, this comment would not cause an informed reasonable observer to doubt the military judge's impartiality.

Accordingly, we find the military judge's actions that Appellant cites do not, individually or collectively, reasonably call into question the military judge's impartiality. Appellant has thus failed to meet his burden to demonstrate the military judge failed to find *sua sponte* that he was disqualified from presiding at Appellant's court-martial.

E. Sentence Severity

1. Law

HN21[↑] We review issues of sentence appropriateness de novo. *United States v. Lane, 64 M.J. 1, 2 (C.A.A.F. 2006)* (citing *United States v. Cole, 31 M.J. 270, 272 (C.M.A. 1990)*). We may affirm only as much of the sentence as we find correct in law and fact and determine should be approved on the basis of the entire record. *Article 66(c), UCMJ, 10 U.S.C. § 866(c)*. "We assess sentence appropriateness by considering the particular appellant, the nature and seriousness of the offense[s], the appellant's record of service, and all matters contained in the record of trial." *United States v. Sauk, 74 M.J. 594, 606 (A.F. Ct. Crim. App. 2015)* (en banc) (alteration in original) (quoting *United States v. Anderson, 67 M.J. 703, 705 (A.F. Ct. Crim. App. 2009)* (per curiam)). Although we **[*41]** have great discretion to determine whether a sentence is appropriate, we have no authority to grant mercy. *United States v. Nerad, 69 M.J. 138, 146 (C.A.A.F. 2010)* (citation omitted).

2. Analysis

Trial counsel recommended the military judge sentence Appellant to a dishonorable discharge, confinement for four years, reduction to the grade of E-1, and total forfeiture of pay and allowances. The military judge sentenced Appellant to a dishonorable discharge, confinement for seven years, reduction to the grade of E-1, and forfeiture of all pay and allowances. Appellant contends the fact that "the military judge sentenced Appellant to more confinement than requested by the trial counsel renders his sentence inappropriately severe," and requests "appropriate sentencing relief." We disagree.

Trial counsel's recommended sentence is simply that, trial counsel's recommendation; it has no binding effect on the military judge. Appellant suggests his sentence resulted from the military judge improperly using information that arose during the trial, such as emotional problems JZ experienced that were not attributable to Appellant and testimony that Appellant asserts was contrary to other evidence. However, the evidence Appellant cites was not improperly **[*42]** admitted, and there is no indication the military judge considered it outside its proper context. ***HN22***[↑] Moreover, "[m]ilitary judges are presumed to know the law and to follow it absent clear evidence to the contrary." *United States v. Rodriguez, 60 M.J. 87, 90 (C.A.A.F. 2004)* (citing *United States v. Mason, 45 M.J. 483, 484 (C.A.A.F. 1997)*). Appellant's conjectures notwithstanding, we find no basis to reach a contrary conclusion in this case.

HN23[↑] The test for an inappropriately severe sentence rests not on trial counsel's recommendation or speculation about the military judge's thought process, but is instead based on what the record reveals about "the particular appellant, the nature and seriousness of the offense[s], the appellant's record of service, and all matters contained in the record of trial." *Sauk, 74 M.J. at 606*. In this case, Appellant exploited his access to his nine-year-old stepdaughter, taking advantage of her mother's absence to hold JZ's buttocks and wrap his arms around her body with the intent to gratify his sexual desire. After AS discovered the suspicious Facebook messages, JZ was too frightened to tell investigators what Appellant had done. Nevertheless, Appellant was not dissuaded from continuing to contact JZ after the divorce, secretly sending indecent communications to the 11-year-old JZ expressing **[*43]** his attraction and sexual desire for her, in order to once again gratify his sexual desires. In an unsworn statement presented through her counsel, JZ described to the military judge how Appellant's actions made her "fear the world." Appellant's offenses were serious and carried a maximum imposable punishment that included confinement for 35 years as well as a dishonorable discharge, reduction, and forfeitures. The defense sentencing case was not particularly strong; Appellant presented information about his life and career,[6] one

[6] At the time of his conviction Appellant had served less than

character statement from a supervisor indicating he performed well at work, and brief telephonic testimony by Appellant's father. The military judge certainly imposed a heavy sentence, but having given individualized consideration to Appellant and all the circumstances of the case, we cannot say the sentence was inappropriately severe as a matter of law.

F. Failure to Pay Deferred and Waived Forfeitures

On 28 January 2019, pursuant to *Articles 57(a)* and *58b*, UCMJ, the convening authority granted Appellant's request to defer automatic forfeitures from 2 November 2018 until action, and to waive automatic forfeitures for the benefit of Appellant's dependent child **[*44]** until the earlier of six months or the expiration of Appellant's term of service.[7] However, in a sworn declaration dated 28 April 2020, Appellant asserted that although the required information had been provided, as of that date Appellant's pay had not been delivered in accordance with the convening authority's direction, despite the efforts of his attorneys.[8] Accordingly, Appellant requested that this court provide sentence relief pursuant to our "power and responsibility" under *Article 66(c), UCMJ, 10 U.S.C. § 866(c)*, to "determine whether the adjudged and approved sentence is appropriate, based on a review of the entire record." *See* *United States v. Gay, 74 M.J. 736, 742 (A.F. Ct. Crim. App. 2015)*, *aff'd*, *75 M.J. 264 (C.A.A.F. 2016)*; *United States v. Tardif, 57 M.J. 219, 224 (C.A.A.F. 2002)*. In response, the Government contends the CAAF's recent decision in *United States v. Jessie, 79 M.J. 437, 441 (C.A.A.F. 2020)*, precludes our consideration of Appellant's claim. We agree with the Government.

HN24[↑] In *Jessie*, the CAAF explained the general rule "that the [Courts of Criminal Appeals] may not consider anything outside of the 'entire record' when reviewing a sentence under *Article 66(c), UCMJ*." *Id.* (citation omitted) (quoting *United States v. Fagnan, 12 C.M.A. 192, 30 C.M.R. 192, 194 (C.M.A. 1961)*). The CAAF explained that for purposes of *Article 66, UCMJ*, the "entire record" includes the "record of trial" and "matters attached to the record" in accordance with R.C.M. 1103(b)(2) and (3), as well as "briefs **[*45]** and arguments that government and defense counsel (and the appellant personally) might present regarding matters in the record of trial and 'allied papers.'" *Id. at 440-41* (citing *United States v. Healy, 26 M.J. 394, 396 (C.M.A. 1988)*). Appellant's 28 April 2020 factual declaration is not part of the "entire record" as defined in *Jessie*, and is therefore presumptively outside the scope of our *Article 66(c), UCMJ*, review.

Appellant's reply brief raises two arguments in response. First, he contends the fact that the convening authority's decision granting the deferment and waiver is in the record gives this court "jurisdiction to consider whether the Government is complying with the convening authority's directive." The CAAF in *Jessie* recognized that "some [of its] precedents have allowed the [Courts of Criminal Appeals] to supplement the record when deciding issues that are raised by materials in the record," specifically with affidavits or hearings ordered pursuant to *United States v. DuBay, 17 C.M.A. 147, 37 C.M.R. 411 (C.M.A. 1967)* (per curiam). *Jessie, 79 M.J. at 442*. In *Jessie*, the CAAF declined to disturb this line of precedent. *Id. at 444*. However, in order to fall under this exception, we understand *Jessie* to require that the apparent or alleged *error* appears within the record of trial. It is not enough that the alleged error merely relates **[*46]** to a pretrial, trial, or post-trial event that is reflected in the record. Appellant's interpretation would essentially rob the general rule set forth in *Jessie* of its meaning, as seemingly any issue related to an appellant's sentence would be linked to a decision, directive, or event in the record of trial.

Second, Appellant notes that the CAAF in *Jessie* recognized an additional exception in a line of precedent "allow[ing] appellants to raise and present evidence of claims of cruel and unusual punishment and violations of *Article 55, UCMJ*, even though there was nothing in the record regarding those claims." *Id. at 444*. However, Appellant's assignment of error made no allegation of cruel or unusual punishment in violation of the *Eighth Amendment*[9] or *Article 55, UCMJ*; instead, it relied specifically on our *Article 66(c), UCMJ*, sentence appropriateness review pursuant to *Gay* and *Tardif*. Moreover, even in his reply brief Appellant entirely fails to demonstrate how the Government's failure to make a timely payment in accordance with the convening

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five years in the Air Force. His service included one deployment to Afghanistan, but was somewhat marred by two letters of reprimand.

[7] The convening authority denied Appellant's request to defer his reduction in grade, an issue that is addressed in detail below.

[8] This court granted Appellant's motion to attach his declaration to the record.

[9] *U.S. Const. amend. VIII*.

authority's deferment and waiver resulted in punishment either "'incompatible with the evolving standards of decency that mark the progress of a maturing society' or . . **[*47]** . 'which involve[d] the unnecessary and wanton infliction of pain.'" *United States v. Lovett, 63 M.J. 211, 215 (C.A.A.F. 2006)* (quoting *Estelle v. Gamble, 429 U.S. 97, 102-03, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976)*). We find Appellant's fleeting reference to the existence of an exception for the *Eighth Amendment* and *Article 55, UCMJ*, inadequate to bring his deferment and forfeiture grievance within the cruel and unusual punishment exception recognized in *Jessie*.[10]

Accordingly, we conclude that under *Jessie* we are without jurisdiction to review Appellant's allegation that the Government wrongfully failed to defer and waive his automatic forfeitures, as directed by the convening authority.

G. Miramar Brig Policy Regarding Contact with Minors

1. Additional Background

In his sworn declaration dated 28 April 2020 to this court, Appellant describes how Miramar Brig policies restricting contact by sex offenders with minors have affected his ability to communicate with his son, who was born in 2017.[11] According to Appellant, Miramar Brig policies generally forbid Appellant to have contact with any minor, including his son. Appellant was able to request specific permission to have contact with his son if he met certain requirements, including *inter alia* obtaining JZ's concurrence. Without JZ's concurrence, the Miramar Brig's clinical therapist **[*48]** would not provide a "favorable recommendation" on the request. In addition, according to Appellant, he was told he cannot have contact with his son until he completes at least six months in the sex offender treatment program at the Miramar Brig. However, in order to enroll in the program Appellant is required to admit that he is guilty of the offenses. Furthermore, other confinees with shorter sentences than Appellant have higher priority for enrollment in the program. As a result, Appellant has not had contact with his son since he arrived at the Miramar Brig.

2. Law

HN25[↑] In general, as described above in connection with the preceding issue, under *Article 66(c), UCMJ*, "the [Courts of Criminal Appeals] may not consider anything outside of the 'entire record' when reviewing a sentence under *Article 66(c), UCMJ*." *Jessie, 79 M.J. at 441* (citation omitted). The CAAF has recognized two exceptions to this rule. First, "some [of the CAAF's] precedents have allowed the [Courts of Criminal Appeals] to supplement the record when deciding issues that are raised by materials in the record." *Id. at 442*. Second, the CAAF has "allowed appellants to raise and present evidence of claims of cruel and unusual punishment and violations of **[*49]** *Article 55, UCMJ*, even though there was nothing in the record regarding those claims." *Id. at 444*.

HN26[↑] We review de novo whether the conditions of an appellant's confinement violate the *Eighth Amendment* or *Article 55, UCMJ*. *United States v. Wise, 64 M.J. 468, 473 (C.A.A.F. 2007)* (citing *United States v. White, 54 M.J. 469, 471 (C.A.A.F. 2001)*).

HN27[↑] "Both the *Eighth Amendment* and *Article 55, UCMJ*, prohibit cruel and unusual punishment. In general, we apply the Supreme Court's interpretation of the *Eighth Amendment* to claims raised under *Article 55, UCMJ*, except where legislative intent to provide greater protections under *Article 55, UCMJ*, is apparent." *Gay, 74 M.J. at 740* (citing *United States v. Avila, 53 M.J. 99, 101 (C.A.A.F. 2000)*). "[T]he *Eighth Amendment* prohibits two types of punishments: (1) those 'incompatible with the evolving standards of decency that mark the progress of a maturing society' or (2) those 'which involve the unnecessary and wanton infliction of pain.'" *Lovett, 63 M.J. at 215* (quoting *Estelle, 429 U.S. at 102-03*). To demonstrate that an appellant's confinement conditions violate the *Eighth Amendment*, an appellant must show:

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[10] We do not discount the possibility that depriving an unconfined servicemember of all pay and allowances while requiring him to continue service might in some circumstances violate *Article 55, UCMJ*, or the *Eighth Amendment*. *See United States v. Jobe, 10 C.M.A. 276, 279, 27 C.M.R. 350 (C.M.A. 1959)*; *United States v. Nelson, 22 M.J. 550, 551 (A.C.M.R. 1986)* (footnote and citation omitted) ("It is *per se* cruel and unusual under contemporary standards of decency . . . to deprive an officer of all pay and allowances without either subjecting him to confinement or immediately releasing him from active duty . . . ."). However, that is not Appellant's situation.

[11] AS was not the mother of Appellant's son.

> (1) an objectively, sufficiently serious act or omission resulting in the denial of necessities; (2) a culpable state of mind on the part of prison officials amounting to deliberate indifference to [his] health and safety; and (3) that he "has exhausted the prisoner-grievance system . . . and that he has petitioned for relief under Article 138, UCMJ, 10 USC § 938 [2000]."

Id. (omission **[*50]** and second alteration in original) (citations omitted).

3. Analysis

Appellant contends the Miramar Brig policies restricting his contact with his son violate his constitutional interest, protected by the Fifth Amendment[12] Due Process Clause, in the companionship and upbringing of his child. *See* Troxel v. Granville, 530 U.S. 57, 65, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000) (citations omitted). Appellant applies the four factors articulated in Turner v. Safley, 482 U.S. 78, 89-91, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987), and concludes the restrictions are not "reasonably related to legitimate penological interests." Id. at 89.[13] The Government responds that Appellant's declaration which forms the basis for this constitutional claim is outside the "entire record" as the CAAF explained that term in *Jessie*, and therefore this court lacks jurisdiction to consider this constitutional claim. *See* Jessie, 79 M.J. at 440-41(citation omitted).

Again, we agree with the Government. Appellant's argument is similar to the particular argument the appellant made in *Jessie*. *See* id. at 439. In *Jessie*, the appellant, who was confined at the Joint Regional Confinement Facility at Fort Leavenworth, argued a policy restricting sexual offenders from having any contact with minors, and requiring him to accept responsibility for his offenses in order to enroll in sex offender treatment, violated his First Amendment[14] and Fifth Amendment rights. *Id.* The Army Court of Criminal **[*51]** Appeals declined to consider the appellant's constitutional claims. *Id.* The CAAF affirmed, finding the Army court had no authority under *Article 66(c), UCMJ*, to consider materials from outside the record that were presented in support of these constitutional claims. Id. at 444. Similarly, the Miramar Brig policies of which Appellant complains in the instant case are not contained in his court-martial record. Under *Jessie*, we lack the authority to consider his 28 April 2020 declaration addressing an issue that is not in the record. *See* id. at 441-43. Accordingly, Appellant cannot prevail on these claims at this court.

However, our review of this issue is not complete. Although Appellant's assignment of error focuses on his "fundamental parental rights," and contains no analysis regarding cruel or unusual punishment or other violation of the Eighth Amendment or Article 55, UCMJ, the heading of this portion of Appellant's brief suggests the Miramar Brig policy violates Article 55, UCMJ.[15] Although we doubt that such a hollow assertion of a violation of Article 55, UCMJ, is sufficient to bring Appellant's claim within the second exception to the general rule explained in *Jessie*, and thereby enable us to consider Appellant's declaration, **[*52]** *see* id. at 444, we will assume *arguendo* that it does so.

We find Appellant's claims to be entirely insufficient to warrant relief under Article 55, UCMJ. Appellant's declaration implicates none of the specific prohibitions enumerated in the article: flogging, branding, marking, tattooing, or the improper use of irons. *See* 10 U.S.C. § 855. **HN28**[] As for the article's prohibition on "other cruel or unusual punishment[s]," *id.*, we "apply the Supreme Court's interpretation of the Eighth Amendment." Gay, 74 M.J. at 740 (citation omitted). Appellant fails to demonstrate punishment "'incompatible with . . . evolving standards of decency,'" "'unnecessary and wanton infliction of pain,'" or an "act or omission resulting in the denial of necessities."

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[12] U.S. Const. amend. V.

[13] These factors include: (1) whether there is "a 'valid, rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it;" (2) "whether there are alternative means of exercising the right that remain open to prison inmates;" (3) "the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources;" and (4) "the absence of ready alternatives" to the regulation in question. Turner, 482 U.S. at 89-91 (citations omitted).

[14] U.S. Const. amend. I.

[15] The heading reads in full:

> THE MIRAMAR BRIG POLICY PREVENTING APPELLANT FROM SEEING HIS TODDLER SON AND REQUIRING HIM TO ADMIT GUILT IN ORDER TO COMPLETE SEX OFFENDER TREATMENT IS UNCONSTITUTIONAL AND/OR A VIOLATION OF ARTICLE 55, UCMJ.

Lovett, 63 M.J. at 215 (footnote omitted) (quoting *Estelle, 429 U.S. at 102-03*). Accordingly, even if this court could consider his 28 April 2020 declaration with regard to this issue, Appellant would be entitled to no relief.

In reaching our conclusions, we make no judgment as to the merits of Appellant's constitutional claims. Appellant may have recourse **[*53]** to courts with the authority to address these claims. However, under *Jessie*, this court is not one of them.

H. Denial of Request to Defer Reduction in Grade

1. Additional Background

Appellant was sentenced on 19 October 2018. On 7 November 2018, Appellant requested through counsel that the convening authority defer the adjudged reduction in grade pursuant to *Article 57(a)(2), UCMJ*, and R.C.M. 1101(c) until action, and that the convening authority waive automatic forfeitures for a period of six months pursuant to *Article 58b(b), UCMJ*, for the benefit of Appellant's dependent son. The special court-martial convening authority (SPCMCA) and his staff judge advocate (SJA) both recommended approval of the requested deferment and waiver. On 7 January 2019, Appellant, through counsel, supplemented this request with additional information, and clarified that he sought deferment of the automatic forfeitures in addition to deferment of the reduction in grade. On 24 January 2019, the convening authority's SJA recommended approval of the requested deferment of the reduction and forfeitures as well as the waiver of forfeitures in order "[t]o maximize assistance to [Appellant's] son." A copy of this recommendation, **[*54]** as well as a draft memorandum for the convening authority's signature approving the entire deferment and forfeiture request, was attached to the copy of the SJA's recommendation also dated 24 January 2019 which was served on the Defense.

On 28 January 2019, the convening authority deferred the automatic forfeitures until action, and waived the automatic forfeitures for the benefit of Appellant's dependent son for a period of six months, expiration of Appellant's term of service, or Appellant's release from confinement, whichever occurred first, with the waiver commencing on the date of action. However, the convening authority denied the requested deferment of reduction in rank, and he did not provide any reason or explanation for the denial. The record does not reflect that the convening authority's decision denying the requested deferment of reduction of rank was served on Appellant.

The convening authority approved the adjudged sentence on 15 February 2019.

2. Law

HN29[↑] *Article 57(a)(2), UCMJ*, authorizes a convening authority, upon application by the accused, to defer a forfeiture of pay or allowances or a reduction in rank until the date the convening authority takes action on the sentence. **[*55]** R.C.M. 1101(c)(3) provides that an accused seeking to have a punishment deferred "shall have the burden of showing that the interests of the accused and the community in deferral outweigh the community's interests in imposition of the punishment on its effective date." The rule outlines several factors which the convening authority may consider in determining whether to grant the request, including *inter alia* the nature of the offenses, the sentence adjudged, the effect of deferment on good order and discipline in the command, and the accused's character, mental condition, family situation, and service record.

HN30[↑] We review a convening authority's denial of a deferment request for an abuse of discretion. *United States v. Sloan, 35 M.J. 4, 6 (C.M.A. 1992)* (citing R.C.M. 1101(c)(3)), *overruled on other grounds by United States v. Dinger, 77 M.J. 447, 453 (C.A.A.F. 2018)*. "When a convening authority acts on an [appellant]'s request for deferment of all or part of an adjudged sentence, the action must be in writing (with a copy provided to the [appellant]) and must include the reasons upon which the action is based." *Id. at 7* (footnote omitted); *see also* R.C.M. 1101(c)(3), Discussion ("If the request for deferment is denied, the basis for the denial should be in writing and attached to the record of trial.").

HN31[↑] Failure to timely comment on matters in or attached **[*56]** to the SJAR forfeits a later claim of error; we analyze such forfeited claims for plain error. *United States v. Zegarrundo, 77 M.J. 612, 613 (A.F. Ct. Crim. App. 2018)* (citations omitted). "To prevail under a plain error analysis, [an appellant] must persuade this Court that: '(1) there was an error; (2) it was plain or obvious; and (3) the error materially prejudiced a substantial right.'" *United States v. Scalo, 60 M.J. 435, 436 (C.A.A.F. 2005)* (quoting *Kho, 54 M.J. at 65*) (additional

citation omitted).

3. Analysis

Under *Sloan*, the convening authority's failure to state his reasons for denying the requested deferment of Appellant's adjudged reduction in rank was an error. *See* 35 M.J. at 7. Because the record does not reflect that the convening authority's decision was attached to the SJA's recommendation or otherwise provided to the Defense prior to Appellant's clemency submission, we find Appellant has not forfeited the error.[16] *See* Zegarrundo, 77 M.J. at 613 (citations omitted).

The Government concedes the error, but contends Appellant is entitled to no relief in the absence of some evidence that the convening authority acted for an improper reason. *See, e.g.*, United States v. Winn De Leon, No. ACM S32544, 2019 CCA LEXIS 396, at *8 (A.F. Ct. Crim. App. 9 Oct. 2019) (unpub. op.); United States v. Jalos, No. ACM 39138, 2017 CCA LEXIS 607, at *6 (A.F. Ct. Crim. App. 5 Sep. 2017) (unpub. op.); United States v. Eppes, No. ACM 38881, 2017 CCA LEXIS 152, at *43 (A.F. Ct. Crim. App. 21 Feb. 2017) (unpub. op.), **[*57]** *aff'd*, 77 M.J. 339 (C.A.A.F. 2018).[17] However, in this case several factors lead us to conclude that relief is warranted under the circumstances.

First, the convening authority's decision with respect to deferring the reduction was contrary to the recommendation of the SPCMCA, the SPCMCA's SJA, and the convening authority's own SJA. We particularly note the two SJAs, who we may presume to be familiar with the applicable law, including Appellant's burden to demonstrate that deferment is appropriate and the factors the convening authority should consider under R.C.M. 1101(c)(1), agreed the convening authority should approve the request.

Second, and relatedly, the record does not indicate the convening authority was advised of the factors enumerated in R.C.M. 1101(c)(1) to guide his decision. Notably, Appellant's request for deferment, the SPCMCA SJA's legal review, and the convening authority SJA's legal review all cite Article 57(a)(2), UCMJ, in order to explain the nature of the request, but none cite the specific guidance in R.C.M. 1101(c)(1).

Third, in contrast to the situation in our recent decision in United States v. Ward, No. ACM 39648, 2020 CCA LEXIS 305, at *7-13 (A.F. Ct. Crim. App. 3 Sep. 2020) (unpub. op.), the Government has not provided a sworn declaration from the convening authority explaining his decision **[*58]** to deny the request. Although, as we noted in *Ward*, "such *post facto* explanations may, even if unconsciously, be influenced by the benefit of hindsight," *id.* at *11-12 (citations omitted), they nevertheless provide some evidence relevant to determining whether the convening authority abused his discretion. The continued absence of any explanation for the convening authority's decision in this case weighs in favor of granting relief.

Under the particular circumstances of this case, we conclude Appellant has been prejudiced by the

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[16] Appellant did not raise this error in his initial assignments of error. After our review of the record, this court issued an order to the Government to show good cause as to why this court should not grant appropriate relief. The Government submitted a timely response to the order, and at the court's invitation Appellant submitted his own response to the show cause order and to the Government's brief. In his brief, Appellant contends he was unaware that the convening authority had denied the deferment of the reduction until 2 May 2020, when he received a copy as a result of filing an inspector general complaint related to the Government's failure to provide pay in accordance with the deferred and waived forfeitures (see Section II.F., *supra*). Thus, Appellant indicates he was unaware of this denial until after he submitted his initial assignments of error, although before he submitted his reply brief to the Government's answer. Our own review of the record and the Government's erroneous statement in its answer that the convening authority *had* approved the deferment of the reduction both lend some plausibility to this claim; however, Appellant has not provided a factual *declaration* that he was unaware of the denial. In light of our resolution of this issue, we find it unnecessary to further examine whether Appellant was misled as to the status of his request for deferment of the reduction. It is enough that, unlike the SJA's recommendation and draft approval of the deferment, the record discloses no evidence that the convening authority's denial was provided to the Defense.

[17] We recognize that these and other unpublished opinions of this court quoted our sister court's published opinion in United States v. Zimmer, 56 M.J. 869, 874 (A. Ct. Crim. App. 2002), with approval, and thereby implied that a credible showing of an improper or unlawful reason is a prerequisite to relief for a *Sloan* error. However, no authority binding on this court has made such a holding, and our recent decision in United States v. Ward, No. ACM 39648, 2020 CCA LEXIS 305, at *7-13 (A.F. Ct. Crim. App. 3 Sep. 2020) (unpub. op.), declined to apply this particular reasoning in *Zimmer*.

convening authority's failure to explain his reasons for denying the requested deferment of the reduction in grade. Appellant was entitled to have this court review the convening authority's decision for an abuse of discretion. HN32[] As our superior court explained in *Sloan*, "[j]udicial review is not an exercise based upon speculation, and we will not permit convening authorities to frustrate the lawful responsibility of the [military appellate courts] . . . ." 35 M.J. at 6-7. In this case, where not only has the convening authority not explained his decision, but he acted contrary to the unanimous advice of the SPCMCA and two senior judge advocates, and the record discloses no indication that **[*59]** the convening authority was advised of appropriate considerations under R.C.M. 1101(c)(1), we conclude that under Sloan we cannot approve the convening authority's decision without abandoning our "lawful responsibility" to review the decision for an abuse of discretion.

We pause to clarify what we are not deciding here. We do not hold that the convening authority actually abused his discretion by denying the deferment of the reduction, or that he was required to follow the advice of the SJA or anyone else. The error here is not the decision to deny the request; the error is the failure to explain the decision, as Sloan requires, which has prejudiced Appellant's right to have the decision reviewed on appeal.

We have considered remanding the record for additional post-trial processing and consideration by the convening authority. However, under the circumstances, we conclude a different remedy is appropriate. We considered that, had events followed their proper course, Appellant would have been served with notice of the denial and the reasons given before he submitted his clemency request. We considered the practical difficulties of requiring a convening authority to, in effect, review decisions previously **[*60]** made for an abuse of discretion. Furthermore, we have considered the length of the post-trial and appellate proceedings in this case to date. We conclude that, in light of the previously-granted waiver of automatic forfeitures, approving a reduction to the grade of E-3 rather than the grade of E-1 will adequately moot any prejudice resulting from the error. *See* United States v. Zimmer, 56 M.J. 869, 875 (A. Ct. Crim. App. 2002); *see also* United States v. Wheelus, 49 M.J. 283, 288 (C.A.A.F. 1998) ("[T]he Courts of Criminal Appeals have broad power to moot claims of prejudice by 'affirming only such findings of guilty and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved.'" (quoting *10 U.S.C. § 866(c)*)).

I. Post-Trial Delay

1. Additional Background

Appellant was sentenced on 19 October 2018, and the convening authority took action on 15 February 2019. Appellant's case was docketed with this court 34 days later, on 21 March 2019.

Appellant's civilian appellate defense counsel entered a notice of appearance on his behalf on 6 May 2019. Appellant's assignments of error were originally due on 20 May 2019. Appellant requested and was granted 11 enlargements of time to file his assignments of error, which he submitted on 28 April **[*61]** 2020. The Government submitted a timely answer on 28 May 2020, without requesting an enlargement of time. Appellant submitted a reply to the Government's answer on 16 June 2020, after requesting and being granted a five-day enlargement of time.

On 14 September 2020, this court issued a show cause order with respect to the convening authority's failure to state his reasons for denying Appellant's request for a deferment of his reduction in grade, an issue that was not addressed in the parties' briefs, as described above. The Government filed a timely response on 25 September 2020, and Appellant submitted his reply on 2 October 2020.

Appellant has not made a demand for timely post-trial review or appeal.

2. Law

HN33[] "We review de novo claims that an appellant has been denied the due process right to a speedy post-trial review and appeal." United States v. Moreno, 63 M.J. 129, 135 (C.A.A.F. 2006) (citing Rodriguez, 60 M.J. at 246; United States v. Cooper, 58 M.J. 54, 58 (C.A.A.F. 2003)). In *Moreno*, the CAAF established a presumption of facially unreasonable delay when the convening authority does not take action within 120 days of sentencing, when the case is not docketed with the Court of Criminal Appeals within 30 days of action, and when the Court of Criminal Appeals does not render a decision within 18 months of docketing. 63 M.J. at 142 **[*62]** . Where there is such a delay, we examine the

four factors set forth in Barker v. Wingo, 407 U.S. 514, 530, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972): "(1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to timely review and appeal; and (4) prejudice [to the appellant]." Moreno, 63 M.J. at 135 (citing United States v. Jones, 61 M.J. 80, 83 (C.A.A.F. 2005); Toohey v. United States, 60 M.J. 100, 102 (C.A.A.F. 2004)). "No single factor is required for finding a due process violation and the absence of a given factor will not prevent such a finding." Id. at 136 (citing Barker, 407 U.S. at 533).

3. Analysis

Appellant's record was not docketed with this court until 34 days after the convening authority's action, exceeding the Moreno standard for a facially unreasonable delay by four days. In addition, this court did not issue its opinion within 18 months of docketing, exceeding the *Moreno* standard. Accordingly, we have considered the Barker factors to assess whether Appellant's due process right to timely review has been infringed.

HN34[] However, the CAAF has held that where an appellant has not shown prejudice from the delay, there is no due process violation unless the delay is so egregious as to "adversely affect the public's perception of the fairness and integrity of the military justice system." United States v. Toohey, 63 M.J. 353, 362 (C.A.A.F. 2006). In *Moreno*, the CAAF identified three types of cognizable prejudice for purposes of an appellant's due process right to timely post-trial review: (1) oppressive incarceration; (2) anxiety and concern; and (3) impairment of the appellant's ability to present a defense at a rehearing. 63 M.J. at 138-39 (citations omitted). In this case, we find no oppressive incarceration because Appellant's appeal has not resulted in any reduction **[*63]** in his term of confinement. HN35[] Similarly, where the appeal does not result in a rehearing on findings or sentence, Appellant's ability to present a defense at a rehearing is not impaired. Id. at 140. As for anxiety and concern, the CAAF has explained "the appropriate test for the military justice system is to require an appellant to show particularized anxiety or concern that is distinguishable from the normal anxiety experienced by prisoners awaiting an appellate decision." *Id.* Appellant has not asserted such particularized anxiety caused by delay in this case, and we discern none. We acknowledge Appellant has expressed concern over the Government's failure to provide pay for his dependents in accordance with the convening authority's deferment and waiver of the mandatory forfeitures, but as we explained above, under Jessie—which the CAAF decided before Appellant filed his assignments of error—this court is without jurisdiction to remedy that asserted error. Accordingly, we do not find any delay in the issuance of this court's opinion contributed to particularized anxiety within the meaning of Moreno with respect to that issue.

The action-to-docketing delay in this case exceeded the 30-day Moreno ***[*64]*** standard by only four days. We note the record is of substantial size, comprised of ten volumes including 969 pages of transcript, and was required to be shipped in multiple copies from Europe to Joint Base Andrews, Maryland. We cannot say this relatively short facially unreasonable delay was so egregious as to undermine confidence in the military justice system.

We are even less troubled by the delay between docketing and the issuance of this court's opinion. The vast majority of the delay was attributable to the defense requests for enlargement of time submitted by or on behalf of Appellant's civilian appellate defense counsel. By the time Appellant filed his assignments of error, more than 13 months had elapsed from the date of docketing. The Government filed a timely answer, without requesting a delay, addressing nine issues Appellant raised on appeal. In addition, this court determined a show cause order and additional briefs from the parties were appropriate to address an additional issue Appellant did not initially raise, but for which he requested relief once it was identified by the court. Moreover, this court is issuing its opinion within two months of the 18-month Moreno **[*65]** standard. Considering the totality of the circumstances, we find no violation of Appellant's due process rights.

Recognizing our authority under *Article 66(c), UCMJ*, we have also considered whether relief for excessive post-trial delay is appropriate even in the absence of a due process violation. *See* Tardif, 57 M.J. at 225. After considering the factors enumerated in Gay, 74 M.J. at 744, we conclude it is not.

III. Conclusion

We affirm only so much of the sentence as provides for a dishonorable discharge, confinement for seven years, and reduction to the grade of E-3. The approved findings and sentence, as modified, are correct in law

and fact, and no other error materially prejudicial to the substantial rights of Appellant occurred. *Articles 59(a)* and *66(c), UCMJ*, *10 U.S.C. §§ 859(a)*, *866(c)*. Accordingly, the findings and modified sentence are **AFFIRMED**. We direct the publication of a new court-martial order in accordance with our decretal paragraph.

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United States v. Hampton

United States Army Court of Criminal Appeals

April 17, 2015, Decided

ARMY 20120290

Reporter
2015 CCA LEXIS 188 *

UNITED STATES, Appellee v. Private E1 TASHANNA A. HAMPTON, United States Army, Appellant

Notice: NOT FOR PUBLICATION

Prior History: **[*1]** Headquarters, Fort Hood. James L. Varley, Military Judge, Colonel Stuart W. Risch, Staff Judge Advocate (pretrial), Colonel Richard W. Rousseau, Staff Judge Advocate (post-trial).

Counsel: For Appellant: Colonel Kevin Boyle, JA; Major Amy E. Nieman, JA; Captain Payum Doroodian, JA (on brief).

For Appellee: Colonel John P. Carrell, JA; Major A.G. Courie III, JA; Captain Benjamin W. Hogan, JA; Captain Carling M. Dunham, JA (on brief).

Judges: Before TOZZI, CAMPANELLA, and CELTNIEKS, Appellate Military Judges. Senior Judge TOZZI and Judge CELTNIEKS concur.

Opinion by: CAMPANELLA

Opinion

SUMMARY DISPOSITION

CAMPANELLA, Judge:

An officer panel, sitting as a special court-martial convicted appellant, contrary to her pleas, of one specification of desertion and one specification of absence without leave [hereinafter AWOL], in violation of Articles 85 and 86, Uniform Code of Military Justice, *10 U.S.C. §§ 885* and *886 (2006)* [hereinafter UCMJ]. The panel sentenced appellant to a bad-conduct discharge. The convening authority approved the sentence as adjudged.

This case is before us for review pursuant to *Article 66*, UCMJ. Appellant raises two assignments of error, one of which warrants discussion but no relief. Specifically, appellant requests relief **[*2]** to remedy the significant dilatory post-trial processing in her case. We disagree that relief is appropriate in this case. We also find that matters raised personally by appellant pursuant to *United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982)* are without merit.

Appellant was nineteen years old when she reported Fort Hood, her first duty station, in September 2008. She became pregnant shortly thereafter. On 13 March 2009, appellant was listed as absent without leave (AWOL) by her unit commander.

Sometime between May or June 2009, appellant went to her home state of Florida, where she prematurely gave birth to her child at a civilian hospital on 27 July 2009. As a result of medical complications, the baby stayed in the hospital for approximately three months after birth. Appellant was allowed to stay at the hospital to learn to care for the baby's significant medical issues.

In May 2010, appellant turned herself into local authorities in Florida after being told by hospital personnel of an outstanding AWOL warrant for her arrest. She was immediately flown back to Fort Hood, leaving her child in the care of her mother.

In July 2010, appellant's mother drove from Florida to Fort Hood with appellant's baby. On 16 July 2010, appellant's baby **[*3]** was diagnosed with asthma and pneumonia and needed specialty medical care.

On 18 July 2010, appellant drove to Florida with her baby and obtained ongoing medical care in Florida. Appellant lived in Florida until she was arrested on 1 November 2011 on unrelated criminal charges and turned over to military authorities.

On 17 August 2012, after she was court-martialed and found guilty of desertion and AWOL, appellant was placed on voluntary excess leave. On appeal, appellant asks for relief from her case's dilatory post-trial processing.

The convening authority took action 666 days after the

sentence was adjudged. Although we find no due process violation in the post-trial processing of appellant's case, we still review the appropriateness of appellant's sentence in light of the unjustified dilatory post-trial processing. *UCMJ art. 66(c)*; *United States v. Tardif, 57 M.J. 219, 224 (C.A.A.F. 2002)* ("[Pursuant to *Article 66(c)*, UCMJ, service courts are] required to determine what findings and sentence 'should be approved,' based on all the facts and circumstances reflected in the record, including the unexplained and unreasonable post-trial delay."); *see generally United States v. Toohey, 63 M.J. 353, 362-63 (C.A.A.F. 2006)*; *United States v. Ney, 68 M.J. 613, 617 (Army Ct. Crim. App. 2010)*; *United States v. Collazo, 53 M.J. 721, 727 (Army Ct. Crim. App. 2000)*.

While ordinarily such extreme post-trial delay might warrant relief, in this case where appellant's **[*4]** punishment was solely a bad-conduct discharge, we find no prejudice to appellant which would warrant the extraordinary measure of disapproving appellant's punitive discharge. In fact, we find the post-trial delay substantially inured to the benefit of appellant. For the entire period of post-trial processing time, appellant and her children* were enrolled in TRICARE Prime, which provides medical care at no cost to appellant. *See 10 U.S.C. § 1074(a)(1)* (Members of the uniformed service on active duty are "entitled to medical and dental care in any facility of any uniformed service."); *see also* Memorandum from The Assistant Secretary of Defense, Health Affairs, Subject: Enrollment of Active Duty Service Members in Appellate Leave Status (Nov. 8, 2006) ("Enrollment to TRICARE Prime is mandatory for all active duty service members (ADSMs). This requirement does not end when the ADSM goes on appellate leave status."). Accordingly, given the totality of the circumstances, we conclude the post-trial delay does not adversely affect the public's perception of the fairness and integrity of the military justice system and no relief is warranted.

CONCLUSION

Upon consideration of the entire record, the findings of guilty and sentence are AFFIRMED.

Senior Judge TOZZI and Judge CELTNIEKS concur.

* It is apparent from the record that appellant has given birth to a second **[*5]** child.

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United States v. Lizana

United States Air Force Court of Criminal Appeals

January 25, 2021, Decided

No. ACM 39280 (reh)

Reporter
2021 CCA LEXIS 19 *; 2021 WL 237419

UNITED STATES, Appellee v. Anthony R. LIZANA, Technical Sergeant (E-6), U.S. Air Force, Appellant

Notice: NOT FOR PUBLICATION

Subsequent History: Petition for review filed by *United States v. Lizana, 2021 CAAF LEXIS 256, 2021 WL 1393434 (C.A.A.F., Mar. 24, 2021)*

Review denied by *United States v. Lizana, 2021 CAAF LEXIS 573 (C.A.A.F., June 22, 2021)*

Prior History: [*1] Appeal from the United States Air Force Trial Judiciary. Military Judge: Bradley A. Morris (motions); Shelly W. Schools. Approved sentence: Bad-conduct discharge and reduction to E-3. Sentence adjudged 6 March 2019 by GCM convened at Joint Base San An-tonio-Lackland, Texas.

United States v. Lizana, 2018 CCA LEXIS 348 (A.F.C.C.A., July 13, 2018)

Case Summary

Overview

HOLDINGS: [1]-The nondisclosure of the abusive sexual contact victim's medical evaluation records did not affect the outcome of the servicemember's court-martial, Unif. Code Mil. Justice art. 46, *10 U.S.C.S. § 846*, because the discharge records did not lead to admissible evidence that rebutted factual assertions in the victim's unsworn statement, and the trial judge gave a clear signal that she found the victim's impression of the impact of the servicemember's actions on her was not a "fact" that was susceptible to being disproved by the contents of a medical evaluation discharge package; [2]-The five-day breach of the Moreno standard did not violate the service member's due process rights because, inter alia, neither the adjudged or approved sentence included any term of confinement, so the post-trial delay could not have caused oppressive incarceration.

Outcome
Sentence affirmed.

LexisNexis® Headnotes

Military & Veterans Law > ... > Courts Martial > Sentences > Deliberations, Instructions & Voting

Military & Veterans Law > Military Justice > Disclosure & Discovery > Discovery by Defense

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Judge Advocate Review

Military & Veterans Law > Military Justice > Disclosure & Discovery > Disclosure by Government

Military & Veterans Law > Military Justice > Apprehension & Restraint of Civilians & Military Personnel > Restrictions

HN1[⬇] **Sentences, Deliberations, Instructions & Voting**

The standard for disclosure of material in the possession of military authorities under R.C.M. 701(a)(2), Manual Courts-Martial, is material to the preparation of the defense.

Military & Veterans Law > Military Justice > Disclosure & Discovery > Depositions &

Interrogatories

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Judicial Discretion

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

Military & Veterans Law > ... > Courts Martial > Motions > Suppression

Military & Veterans Law > ... > Courts Martial > Evidence > Evidentiary Rulings

HN2[] Disclosure & Discovery, Depositions & Interrogatories

An appellate court reviews a military judge's ruling on a motion to compel discovery for an abuse of discretion. A military judge abuses his discretion when his findings of fact are clearly erroneous, when he is incorrect about the applicable law, or when he improperly applies the law.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Criminal Law & Procedure > ... > Discovery & Inspection > Brady Materials > Brady Claims

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Due Process

HN3[] Procedural Due Process, Scope of Protection

The suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. The United States Supreme Court has extended Brady, clarifying that the duty to disclose such evidence is applicable even though there has been no request by the accused and that the duty encompasses impeachment evidence as well as exculpatory evidence.

Military & Veterans Law > Military Justice > Disclosure & Discovery > Disclosure by Government

Military & Veterans Law > Military Justice > Disclosure & Discovery > Discovery by Defense

Military & Veterans Law > Military Justice > Apprehension & Restraint of Civilians & Military Personnel > Restrictions

Military & Veterans Law > Military Justice > Apprehension & Restraint of Civilians & Military Personnel > Unlawful Restraint

HN4[] Disclosure & Discovery, Disclosure by Government

A military accused has the right to obtain favorable evidence under Unif. Code Mil. Justice art. 46, 10 U.S.C.S. § 846, as implemented by R.C.M. 701-703. Article 46, and the implementing rules provide a military accused statutory discovery rights greater than those afforded by the United States Constitution. With respect to discovery, R.C.M. 701(a)(2)(A), Manual Courts-Martial, requires the Government, upon defense request, to permit the inspection of, inter alia, any documents within the possession, custody, or control of military authorities, and which are material to the preparation of the defense.

Criminal Law & Procedure > ... > Discovery & Inspection > Brady Materials > Appellate Review

Military & Veterans Law > Military Justice > Disclosure & Discovery > Disclosure by Government

Criminal Law & Procedure > Appeals > Reversible Error > Discovery

HN5[] Brady Materials, Appellate Review

In reviewing discovery matters, an appellate court conducts a two-step analysis: first, the appellate court determines whether the information or evidence at issue was subject to disclosure or discovery; second, if there was nondisclosure of such information, the appellate court tests the effect of that nondisclosure on the appellant's trial. An appellate court may resolve a discovery issue without determining whether there has been a discovery violation if the court concludes that the alleged error would not have been prejudicial. Where

the defense specifically requests discoverable information that is erroneously withheld, the error is tested for harmlessness beyond a reasonable doubt. Failing to disclose requested material favorable to the defense is not harmless beyond a reasonable doubt if the undisclosed evidence might have affected the outcome of the trial.

Military & Veterans Law > Military Justice > Counsel

Military & Veterans Law > ... > Courts Martial > Sentences > Presentencing Proceedings

Military & Veterans Law > ... > Courts Martial > Sentences > Deliberations, Instructions & Voting

Military & Veterans Law > Military Justice > Disclosure & Discovery > Depositions & Interrogatories

Military & Veterans Law > Military Justice > Disclosure & Discovery > Disclosure by Government

HN6[] Military Justice, Counsel

R.C.M. 1001A(e), Manual Courts-Martial, provides that during presentencing proceedings, the victim of an offense of which the accused has been found guilty may make an unsworn statement and may not be cross-examined by the trial counsel or defense counsel upon it or examined upon it by the court-martial. The prosecution or defense may rebut statements of fact in a victim's unsworn statement. R.C.M. 1001A(e), Manual Courts-Martial.

Military & Veterans Law > ... > Courts Martial > Judges > Challenges to Judges

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Judicial Discretion

HN7[] Judges, Challenges to Judges

Military judges are presumed to know the law and to follow it absent clear evidence to the contrary.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Actions by Convening Authority

Military & Veterans Law > Military Justice > Apprehension & Restraint of Civilians & Military Personnel > Speedy Trial

Military & Veterans Law > Military Justice > Judicial Review > US Court of Appeals for the Armed Forces

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN8[] Procedural Due Process, Scope of Protection

The four factors the United States Court of Appeals for the Armed Forces has identified to assess whether an appellant's due process right to timely post-trial and appellate review has been violated are as follows: (1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to timely review and appeal; and (4) prejudice. An appellate court reviews de novo claims that an appellant has been denied the due process right to a speedy post-trial review and appeal.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Military & Veterans Law > Military Justice > Apprehension & Restraint of Civilians & Military Personnel > Speedy Trial

Military & Veterans Law > Military Justice > Judicial Review > US Court of Appeals for the Armed Forces

HN9[] Procedural Due Process, Scope of Protection

The United States Court of Appeals for the Armed Forces has identified three types of cognizable prejudice for purposes of an appellant's due process right to timely post-trial review: (1) oppressive incarceration; (2) anxiety and concern; and (3) impairment of the appellant's ability to present a defense at a rehearing.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Military & Veterans Law > Military Justice > Apprehension & Restraint of Civilians & Military Personnel > Speedy Trial

HN10[] **Procedural Due Process, Scope of Protection**

Where an appellant does not prevail on the substantive grounds of his appeal, there is no oppressive incarceration. Similarly, where the appellant's substantive appeal fails, his ability to present a defense at a rehearing is not impaired. With regard to anxiety and concern, the appropriate test for the military justice system is to require an appellant to show particularized anxiety or concern that is distinguishable from the normal anxiety experienced by prisoners awaiting an appellate decision. Where there is no qualifying prejudice from the delay, there is no due process violation unless the delay is so egregious as to adversely affect the public's perception of the fairness and integrity of the military justice system.

Counsel: For Appellant: Major M. Dedra Campbell, USAF; Major Meghan R. Glines-Barney, USAF.

For Appellee: Lieutenant Colonel Brian C. Mason, USAF; Major Anne M. Delmare, USAF.

Judges: Before J. JOHNSON, MINK, and KEY, Appellate Military Judges. Chief Judge J. JOHNSON delivered the opinion of the court, in which Senior Judge MINK and Judge KEY joined.

Opinion by: J. JOHNSON

Opinion

J. JOHNSON, Chief Judge:

At Appellant's original trial, a general court-martial composed of officer and enlisted members convicted Appellant, contrary to his pleas, of two speci-fications of willfully failing to maintain a professional relationship, one specification of negligently failing to maintain a professional relationship, one specification of sexual assault, one specification of assault consummated by a battery, two specifications of adultery, and two specifications of providing alcohol to minors, in violation of *Articles 92*, *120*, *128*, and *134, Uniform Code of Military Justice (UCMJ)*, **[*2]** *10 U.S.C. §§ 892*, *920*, *928*, *934*.[1] The court-martial sentenced Appellant to a dishonorable discharge, confinement for three months, hard labor without confinement for one month, forfeiture of $450.00 pay per month for one month, and reduction to the grade of E-3. The convening authority reduced the term of hard labor without confinement to nine days and affirmed the remaining elements of the sentence as adjudged.

Upon our initial review, this court set aside Appellant's sexual assault conviction as factually insufficient, but affirmed the lesser-included offense of abusive sexual contact in violation of *Article 120, UCMJ*, as well as the other findings of guilty. *United States v. Lizana, No. ACM 39280, 2018 CCA LEXIS 348, at *31 (A.F. Ct. Crim. App. 13 Jul. 2018)* (unpub. op.). This court also set aside the sentence and returned the record to The Judge Advocate General for remand to the convening authority, who was authorized to direct a rehearing as to the sentence. *Id. at *31-32*.

The convening authority directed a sentence rehearing. A general court-martial composed of a military judge alone sentenced Appellant to a bad-conduct discharge and reduction to the grade of E-1. The convening authority approved the bad-conduct discharge and reduction **[*3]** to the grade of E-3.

Appellant now raises a single issue on appeal: whether the military judge abused his discretion by refusing to order the production of the medical evaluation board records of MH, the abusive sexual contact victim. In addition, although not raised by Appellant, we consider whether Appellant is entitled to relief for facially unreasonable post-trial delay. We find no error that materially prejudiced Appellant's substantial rights, and we affirm the sentence.

I. Background

Appellant's convictions arose from his behavior with several lower-ranking female Airmen whom Appellant knew from his workplace at Joint Base San Antonio-

[1] Unless otherwise noted, all other references to the UCMJ, the Rules for Courts-Martial, and the Military Rules of Evidence are to the *Manual for Courts-Martial, United States* (2016 ed.) (2016 *MCM*).

Lackland, some of whom were Appellant's direct subordinates. The circumstances underlying Appellant's conviction for abusive sexual contact against MH by touching her vaginal area without her consent are described in more detail in our prior opinion; it is not necessary to expound them for purposes of this opinion. *Id. at *17-24*. MH was on active duty with the Air Force at the time of Appellant's first court-martial; however, she was subsequently separated from the Air Force as a result of a medical evaluation board (MEB), and was a civilian at the time of Appellant's **[*4]** sentence rehearing.

Prior to the sentence rehearing, the Defense submitted a motion to compel discovery of several types of evidence it asserted was in the possession of the Government, including *inter alia* MH's "MEB discharge package." In support of this request, the Defense cited MH's response to a disciplinary action administered before she separated from the Air Force,[2] in which MH stated she had mental health issues related to Appellant's offense against her. In addition, the Defense contended it needed the MEB discharge package to see if it contained any "conflicting statements."

The Government opposed the Defense's request for the MEB discharge material, contending that trial counsel "d[id] not have access to this, and from what the Government understands, the package is replete with material privileged under [Mil. R. Evid.] 513." Therefore, the Government argued, the Defense was required to seek disclosure of the MEB information in accordance with the procedural requirements of Mil. R. Evid. 513, and it had not done so.

On 13 December 2018, the first military judge assigned to Appellant's sentence rehearing (motions judge) conducted a hearing on the discovery motion. At the hearing, trial defense counsel clarified **[*5]** that any information covered by Mil. R. Evid. 513 might be made the subject of a separate motion, and was not requested by the Defense "at this time." However, trial defense counsel maintained the request for documents regarding MH's medical separation were not covered by Mil. R. Evid. 513. In response, trial counsel told the motions judge:

> [I]t's the government's understanding at this time that there is nothing AFPC [the Air Force Personnel Center] can do to provide those records without a judicial order, based on our conversations with Air Force Personnel Center's records custodian. From my understanding, the records are replete with diagnostic communications between the victim and her providers. To the extent that there may have been a waiver of that privilege in an administrative hearing, the government isn't ready to opine on, but the government's position is that there is a process for determining that under MRE 513, and so that issue is not ripe at this moment, because the government cannot access — cannot turn over anything without a judicial order . . . .

After the hearing, the motions judge issued a written ruling on the motion. With respect to MH's MEB discharge records, the motions judge wrote the following:

> This **[*6]** Court finds that this material is not within the possession, custody, or control of military authorities. As such, the Defense is required to abide by the requirements of [Rule for Courts-Martial (R.C.M.)] 701(f)(3) [sic][3]] and has failed to do so. Even if they had, this Court would find that the Defense has further failed to show how the MEB materials of MH that occurred after the trial, are relevant and necessary to their sentencing case at this sentence rehearing. Should an Appellate Court later determine the materials were in the possession, custody or control of military authorities in the more broad definition of "military authorities", this Court would have determined that the Defense failed in their burden to show how these documents were material to their preparing an adequate defense to the charge of which he was convicted as required under [R.C.M.] 701 since these materials did not exist at the time of his initial court-martial. Lastly, this Court does not find the materials to be protected by [Mil R. Evid.] 513 as the statements, if any, contained in the materials are no longer confidential due to their disclosure to a third party as part of the MEB process. Regardless, due to the above, this request is **DENIED**.

Appellant's sentence rehearing **[*7]** reconvened on 5-6 March 2019, and was presided over by a different

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[2] The Defense obtained the records of this disciplinary action and MH's response from the Government through discovery.

[3] The 2016 *MCM* does not contain a Rule for Courts-Martial 701(f)(3). Later in the trial, trial defense counsel and the second military judge interpreted the motions judge's intent was to refer to R.C.M. 703(f)(3), which would apply to the production of material that is not in the possession of military authorities that is "relevant and necessary." *See* R.C.M. 703(f)(1).

military judge (the trial judge). Appellant elected to be sentenced by the military judge alone. Pursuant to R.C.M. 1001A, MH read an unsworn statement to the trial judge, wherein she described how Appellant's offense had affected her and stated, *inter alia*, "[t]his incident has caused me years of stress and has contributed to an early end to my Air Force career."

After MH read her unsworn statement, the Defense asked the trial judge to reconsider the motions judge's denial of the discovery motion with respect to MH's MEB discharge records. Trial defense counsel asserted that in light of the Defense's right to rebut statements of fact in a victim's unsworn statement, MH's assertion that Appellant's offense contributed to separation from the Air Force made the MEB discharge records "relevant and necessary" to the Defense at the sentence rehearing. When questioned by the trial judge, trial defense counsel could not identify any information he expected to find in the MEB discharge material that would rebut MH's unsworn statement, but he asserted the applicable standard at that point was simply "relevance and necessity" to the Defense **[*8]** under R.C.M. 701.[4]

The trial judge denied the request for reconsideration. She explained:

> The purpose of the law that allows crime victims to provide statements in sentencing is to give them a voice in the process to speak to what they view as the impact of a crime on them personally. I read this statement for exactly what it is; her personal perception and opinion of how she's been impacted by this -- by at least in part -- by this behavior of [Appellant]. I don't read it to mean that any and all of her life struggles are all attributed to [Appellant], but at least some aspect of them are, in her opinion, and she has the right to say that, and I will give it the weight that it deserves in this process.

II. Discussion

A. Discovery of MH's MEB Discharge Records

1. Law

HN2[↑] We review a military judge's ruling on a motion to compel discovery for an abuse of discretion. *United States v. Roberts, 59 M.J. 323, 326 (C.A.A.F. 2004)* (citation omitted). "A military judge abuses his discretion when his findings of fact are clearly erroneous, when he is incorrect about the applicable law, or when he improperly applies the law." *Id.*

HN3[↑] "[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either **[*9]** to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963)*. The United States Supreme Court has extended *Brady*, clarifying "that the duty to disclose such evidence is applicable even though there has been no request by the accused . . . and that the duty encompasses impeachment evidence as well as exculpatory evidence." *Strickler v. Greene, 527 U.S. 263, 280, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999)*; *see United States v. Claxton, 76 M.J. 356, 359 (C.A.A.F. 2017)*.

HN4[↑] "A military accused also has the right to obtain favorable evidence under [*Article 46, UCMJ*,] . . . as implemented by R.C.M. 701-703." *United States v. Coleman, 72 M.J. 184, 186-87 (C.A.A.F. 2013)* (footnotes omitted). *Article 46, UCMJ*, and these implementing rules provide a military accused statutory discovery rights greater than those afforded by the United States Constitution. *See id. at 187* (additional citation omitted) (citing *Roberts, 59 M.J. at 327*). With respect to discovery, R.C.M. 701(a)(2)(A) requires the Government, upon defense request, to permit the inspection of, *inter alia*, any documents "within the possession, custody, or control of military authorities, and which are material to the preparation of the defense . . . ."

HN5[↑] In reviewing discovery matters, we conduct a two-step analysis: "first, we determine whether the information or evidence at issue was subject to disclosure or discovery; second, if there was nondisclosure of such information, **[*10]** we test the effect of that nondisclosure on [Appellant's] trial." *Coleman, 72 M.J. at 187* (quoting *Roberts, 59 M.J. at 325*). "[A]n appellate court may resolve a discovery issue without determining whether there has been a discovery violation if the court concludes that the alleged error would not have been prejudicial." *United States v. Santos, 59 M.J. 317, 321 (C.A.A.F. 2004)*.

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[4] We note "relevant and necessary" is the standard for production of evidence under R.C.M. 703(f)(1). *HN1*[↑] The standard for disclosure of material in the possession of military authorities under R.C.M. 701(a)(2) is "material to the preparation of the defense."

Where the defense specifically requests discoverable information that is erroneously withheld, the error is tested for harmlessness beyond a reasonable doubt. *Coleman, 72 M.J. at 187* (citations omitted). "Failing to disclose requested material favorable to the defense is not harmless beyond a reasonable doubt if the undisclosed evidence might have affected the outcome of the trial." *Id.* (citation omitted).

HN6[↑] R.C.M. 1001A(e) provides that during presentencing proceedings, the victim of an offense of which the accused has been found guilty "may make an unsworn statement and may not be cross-examined by the trial counsel or defense counsel upon it or examined upon it by the court-martial." The prosecution or defense may rebut statements of fact in a victim's unsworn statement. R.C.M. 1001A(e).

Mil. R. Evid. 513(a) provides:

> A patient has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made between the patient and a psychotherapist **[*11]** or an assistant to a psychotherapist, in a case arising under the [UCMJ], if such communication was made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition.

The privilege is subject to a number of specific exceptions. Mil. R. Evid. 513(d).

2. Analysis

Appellant contends the motions judge abused his discretion by denying the Defense's motion to compel disclosure of MH's MEB discharge records. He asserts the record of trial indicates the information was located at AFPC, and therefore was within the "possession, custody, or control of military authorities." R.C.M. 701(a)(2)(A). He further asserts trial defense counsel demonstrated the information was material, relevant, and necessary because without it the Defense "could not rebut [MH's] unsworn statement and identify the accurate causes of her separation."

The motions judge's ruling on the motion is perplexing in multiple respects. We find no basis in the record for the conclusion that MH's MEB discharge records were not in the possession of military authorities; trial counsel's proffers clearly indicated such records existed at AFPC, a component of the Air Force. The fact that AFPC was unwilling to release sensitive mental health **[*12]** information without a court order did not remove it from the military's possession and control. Moreover, the motions judge's determination that the Defense "failed in their burden to show how these documents were material to their preparing an adequate defense to the charge" because "these materials did not exist at the time of his initial court-martial" was inapposite. The records evidently existed at the time of Appellant's sentence rehearing, and Appellant had a right to discovery of information in the possession of the Air Force that was material to the preparation of his defense at a sentence rehearing, provided it was otherwise discoverable under the Rules for Courts-Martial and Military Rules of Evidence. Furthermore, we are puzzled by the judge's pronouncement in his ruling that the records in question were not protected by Mil. R. Evid. 513 given that he did not have adequate information to determine whether the privilege was applicable to the information in the records at issue, and such a determination was unnecessary for his ruling.

However, we decline to definitively determine whether the failure to compel disclosure of the MEB records was error. We question whether the Defense made an **[*13]** adequate demonstration of materiality in its initial motion. Arguably, information regarding the reasons for MH's discharge would not become material, if it ever did, until MH's unsworn statement (if any) or evidence at the rehearing attributed Appellant's offense as a contributing factor. On the other hand, because the military judge did not cite such a rationale for denying the motion, we decline to uphold his ruling on that basis.

Instead, we resolve the issue by finding any error was harmless beyond a reasonable doubt. *See Santos, 59 M.J. at 321*. As an initial matter, we note that the significance of MH's MEB records to Appellant's court-martial, if it had any, existed in a very narrow context—to enable the Defense to respond in case MH stated, as anticipated, that Appellant's offense against her contributed to the early end of her Air Force career. This anticipated significance was borne out at the sentence rehearing when MH said just that in her unsworn statement. Thus, in order to affect the proceedings, the MEB discharge records would need to have led to admissible evidence that rebutted factual assertions in MH's unsworn statement.

We find no indication that anything in these records would have led **[*14]** to admissible rebuttal evidence. At no point was the Defense able to identify any specific information that was likely to be in the records that would rebut MH's unsworn statement. Even assuming *arguendo* that the records included no suggestion by

MH that Appellant's actions contributed to her discharge, that would not "rebut" her impression at the sentence rehearing that his actions had contributed to it.

Furthermore, we note that Appellant elected to be sentenced by the trial judge alone. The trial judge explained her reasoning for denying the Defense's motion to reconsider the motion judge's ruling. Rather than adopting the rationales in that ruling, as described above, the trial judge focused on the nature of MH's unsworn statement and highlighted the subjective nature of MH's "personal perception and opinion." The trial judge gave a clear signal that she found MH's impression of the impact of Appellant's actions on her was not a "fact" that was susceptible to being disproved by the contents of a MEB discharge package. *Cf.* United States v. Fetrow, 76 M.J. 181, 185 (C.A.A.F.) (stating the standard of review for a military judge's decision on the admission of evidence is an abuse of discretion) (citation omitted). Relatedly, the trial **[*15]** judge stated she would give MH's "personal perception and opinion" expressed through he unsworn statement "the weight that it deserves in this process." ***HN7***[↑] "Military judges are presumed to know the law and to follow it absent clear evidence to the contrary." United States v. Rodriguez, 60 M.J. 87, 90 (C.A.A.F. 2004) (citing United States v. Mason, 45 M.J. 483, 484 (C.A.A.F. 1997)). Reviewing the proceedings as a whole, including the sentence adjudged, we are confident beyond a reasonable doubt that the nondisclosure of MH's MEB records did not affect the outcome. *See* Coleman, 72 M.J. at 187.

B. Post-Trial Delay

Appellant's court-martial concluded on 6 March 2019. However, the convening authority did not take action until 9 July 2019. This 125-day period exceeded by five days the 120-day threshold for a presumptively unreasonable post-trial delay the United States Court of Appeals for the Armed Forces (CAAF) established in United States v. Moreno, 63 M.J. 129, 142 (C.A.A.F. 2006). ***HN8***[↑] Accordingly, we have considered the four factors the CAAF identified in *Moreno* to assess whether Appellant's due process right to timely post-trial and appellate review has been violated: "(1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to timely review and appeal; and (4) prejudice." Id. at 135 (citing United States v. Jones, 61 M.J. 80, 83 (C.A.A.F. 2005); Toohey v. United States, 60 M.J. 100, 102 (C.A.A.F. 2004) (per curiam)). "We review de novo claims that an appellant **[*16]** has been denied the due process right to a speedy post-trial review and appeal." *Id.* (citations omitted).

HN9[↑] In *Moreno*, the CAAF identified three types of cognizable prejudice for purposes of an appellant's due process right to timely post-trial review: (1) oppressive incarceration; (2) anxiety and concern; and (3) impairment of the appellant's ability to present a defense at a rehearing. 63 M.J. at 138-39 (citations omitted). In this case, neither the adjudged or approved sentence included any term of confinement, so the post-trial delay cannot have caused oppressive incarceration. ***HN10***[↑] Furthermore, where the appellant does not prevail on the substantive grounds of his appeal, there is no oppressive incarceration. Id. at 139. Similarly, where Appellant's substantive appeal fails, his ability to present a defense at a rehearing is not impaired. Id. at 140. With regard to anxiety and concern, "the appropriate test for the military justice system is to require an appellant to show particularized anxiety or concern that is distinguishable from the normal anxiety experienced by prisoners awaiting an appellate decision." *Id.* Appellant has made no claim or showing of such particularized anxiety or concern in this case, and we perceive **[*17]** none.

Where there is no qualifying prejudice from the delay, there is no due process violation unless the delay is so egregious as to "adversely affect the public's perception of the fairness and integrity of the military justice system." United States v. Toohey, 63 M.J. 353, 362 (C.A.A.F. 2006). We conclude that under the circumstances, the five-day breach of the Moreno standard was not so egregious, and we do not find a violation of Appellant's due process rights.

Recognizing our authority under *Article 66(c), UCMJ, 10 U.S.C. § 866(c)*, we have also considered whether relief for excessive post-trial delay is appropriate in this case even in the absence of a due process violation. *See* United States v. Tardif, 57 M.J. 219, 225 (C.A.A.F. 2002). After considering the factors enumerated in United States v. Gay, 74 M.J. 736, 744 (A.F. Ct. Crim. App. 2015), *aff'd*, 75 M.J. 264 (C.A.A.F. 2016), we conclude no such relief is appropriate.

III. CONCLUSION

The findings were previously affirmed. The approved sentence is correct in law and fact, and no error materially prejudicial to the substantial rights of

Appellant occurred. *Articles 59(a)* and *66(c), UCMJ*, *10 U.S.C. §§ 859(a)*, *866(c)*. Accordingly, the sentence is **AFFIRMED**.[5]

End of Document

[5] We note several errors in the court-martial order with respect to the charges and specifications: Charge III, Specification 2 omits the word "her;" the "Finding" with respect to Charge III, Specification 3, should indicate "*Article 120*" vice "Article 120DB;" and Charge V, Specifications 1 and 2 omit the phrase "a married man." We direct the publication of a corrected court-martial order to remedy these errors.

United States v. Lorance

United States Army Court of Criminal Appeals

June 27, 2017, Decided

ARMY 20130679

Reporter
2017 CCA LEXIS 429 *

UNITED STATES, Appellee v. First Lieutenant CLINT A. LORANCE, United States Army, Appellant

Notice: NOT FOR PUBLICATION

Subsequent History: Motion denied by *United States v. Lorance, 77 M.J. 130, 2017 CAAF LEXIS 1131 (C.A.A.F., Dec. 12, 2017)*

Review denied by *United States v. Lorance, 77 M.J. 136, 2017 CAAF LEXIS 1165 (C.A.A.F., Dec. 19, 2017)*

Writ of habeas corpus dismissed, Without prejudice, Motion denied by *Lorance v. Commandant, United States Disciplinary Barracks, 2019 U.S. Dist. LEXIS 194827 (D. Kan., Nov. 8, 2019)*

Writ of habeas corpus dismissed, Motion granted by *Lorance v. Commandant, United States Disciplinary Barracks, 2020 U.S. Dist. LEXIS 12339 (D. Kan., Jan. 24, 2020)*

Prior History: [*1] Headquarters, Fort Bragg. Kirsten V. Brunson, Military Judge, Colonel John N. Ohlweiler, Staff Judge Advocate (pretrial and recommendation), Lieutenant Colonel Dean L. Whitford, Staff Judge Advocate (addendum).

Case Summary

Overview
HOLDINGS: [1]-A commissioned officer who was convicted of attempted murder, murder, obstructing justice, and other crimes, in violation of UCMJ arts. 80, 118, and 134, 10 U.S.C.S. §§ 880, 918, and 934, based on evidence that he ordered soldiers under his command to shoot Afghan nationals who had no observable weapons or radios and were not displaying any hostility toward U.S. or Afghan forces, was not entitled to a new trial because the Government did not inform the defense that one of the victims who was killed knew someone who was linked to hostile action against U.S. forces, that another victim was biometrically linked to an IED incident that occurred before he was killed, and that the surviving victim was allegedly involved in hostile action against U.S. forces after he was wounded; [2]-There was no merit to the officer's claim that he was denied effective assistance of counsel.

Outcome
The court denied the officer's petition for a new trial and affirmed the findings of guilty and the sentence.

LexisNexis® Headnotes

Military & Veterans Law > ... > Trial Procedures > Witnesses > Compulsory Attendance of Witnesses

Military & Veterans Law > Military Justice > Disclosure & Discovery > Disclosure by Government

Military & Veterans Law > Military Justice > Disclosure & Discovery > Discovery by Defense

HN1[] **Witnesses, Compulsory Attendance of Witnesses**

Unif. Code Mil. Justice art. 46, *10 U.S.C.S. § 846*, provides trial counsel, defense counsel, and a court-martial with equal opportunity to obtain witnesses and other evidence in accordance with rules prescribed by the President. The Rules for Courts-Martial elucidate a trial counsel's unique obligations in furtherance of Article 46's mandate. R.C.M. 701(a)(6), Manual Courts-Martial ("MCM") provides that trial counsel shall, as soon as practicable, disclose to the defense the existence of evidence known to trial counsel which reasonably tends to negate or reduce the guilt or punishment of an

accused, and R.C.M. 701(a)(2)(A) provides that trial counsel shall permit the defense to inspect certain items which are within the possession, custody, or control of military authorities, and which are material to the preparation of the defense. The former provision requires no triggering action on behalf of the defense, while the later provision requires a request from the defense to trigger trial counsel's obligation, for without such a request, a trial counsel might be uncertain in many cases as to the extent of the duty to obtain matters not in his or her immediate possession. R.C.M. 701, Analysis, MCM at A21-34. Whether trial counsel exercised reasonable diligence in response to a request will depend on the specificity of the request.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Criminal Law & Procedure > ... > Discovery & Inspection > Brady Materials > Brady Claims

Criminal Law & Procedure > ... > Discovery & Inspection > Brady Materials > Duty of Disclosure

HN2[] Procedural Due Process, Scope of Protection

R.C.M. 701(a)(6), Manual Courts-Martial is based on the United States Supreme Court's decision in Brady v. Maryland and its progeny, which in turn, is derived from the *Due Process Clause of the Fifth Amendment to the U.S. Constitution*. Brady requires the prosecution to disclose evidence that is material and favorable to the defense, and creates an affirmative duty to disclose that requires no triggering action by the defense. Evidence is said to be "material" if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. The duty to learn of any favorable evidence known to others acting on the Government's behalf in a case, including the police, has long been a recognized duty of trial counsel. In order to have a true Brady violation, the evidence at issue must be favorable to the accused, either because it is exculpatory or because it is impeaching, the evidence must have been suppressed by the state, either willfully or inadvertently, and prejudice must have ensued. Courts have a responsibility to consider the impact of undisclosed evidence dynamically, in light of the rest of the trial record. Once a Brady violation is established, courts need not test for harmlessness.

Military & Veterans Law > Military Justice > Disclosure & Discovery > Disclosure by Government

HN3[] Disclosure & Discovery, Disclosure by Government

While the United States Army Court of Criminal Appeals has long held that the rules of military discovery are generous, it declines to require trial counsel to seek out and search into the abyss of the intelligence community for the potential existence of unspecified information.

Criminal Law & Procedure > Preliminary Proceedings > Discovery & Inspection

Military & Veterans Law > Military Justice > Disclosure & Discovery

HN4[] Preliminary Proceedings, Discovery & Inspection

The rules of discovery are grounded on the fundamental concept of relevance. None but facts having rational probative value are admissible.

Military & Veterans Law > Military Justice > Disclosure & Discovery > Disclosure by Government

HN5[] Disclosure & Discovery, Disclosure by Government

To comply with the United States Supreme Court's decision in Brady v. Maryland, a trial counsel must search his or her own file, and the files of related criminal and administrative investigations. However, consistent with the United States Court of Appeals for the Armed Forces' interpretation of the issue, the United States Army Court of Criminal Appeals requires a trial counsel only exercise due diligence.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Assistance of Counsel

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

Military & Veterans Law > Military Justice > Counsel

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN6 **Criminal Process, Assistance of Counsel**

To prevail on an ineffective assistance of counsel claim, which the United States Army Court of Criminal Appeals ("ACCA") reviews de novo, an appellant must show that counsel's performance fell below an objective standard of reasonableness, and that counsel's deficient performance gives rise to a reasonable probability that the result of the proceeding would have been different without counsel's unprofessional errors. In evaluating the first prong of the test the United States Supreme Court adopted in Strickland v. Washington, the ACCA must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. When evaluating the second Strickland prong, the ACCA must determine whether, absent counsel's errors, there is a reasonable probability the factfinder would have had a reasonable doubt as to an appellant's guilt. A court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defense as a result of alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Assistance of Counsel

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

Military & Veterans Law > Military Justice > Counsel

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN7 **Criminal Process, Assistance of Counsel**

The performance of defense counsel is measured by the combined efforts of the defense team as a whole, and the United States Army Court of Criminal Appeals ("ACCA") considers an appellant's claim that he received ineffective assistance of counsel in light of the defense team's performance as a unit. The ACCA also considers every claim by an appellant balanced against the complete record before the court, including the experience, and abilities of trial defense counsel, the pretrial proceedings, the investigative efforts of the defense team, the selection of the court members, the trial strategy, the performance of counsel during the trial, the sentencing case, and the posttrial proceedings.

Counsel: For Appellant: Lieutenant Colonel Jonathan F. Potter, JA; Captain Payum Doroodian, JA; John N. Maher, Esq.; John D. Carr, Esq. (on brief); Captain Scott Martin, JA; John N. Maher, Esq.; John D. Carr, Esq. (on reply brief); Lieutenant Colonel Jonathan F. Potter, JA; John N. Maher, Esq.; John D. Carr, Esq. (Petition for New Trial); Lieutenant Colonel Jonathan F. Potter, JA; Captain Payum Doroodian, JA; John N. Maher, Esq.; John D. Carr, Esq. (reply brief on Petition for New Trial).

For Appellee: Colonel Mark H. Sydenham, JA; Lieutenant Colonel A.G. Courie III, JA; Captain Samuel E. Landes, JA (on brief);[1] Colonel Mark H. Sydenham, JA; Lieutenant Colonel A.G. Courie III, JA; Captain Samuel E. Landes, JA (on reply brief); Colonel Mark H. Sydenham, JA; Major Daniel D. Derner, JA; Captain Samuel E. Landes, JA (brief and reply brief in response to Petition for New Trial).

Judges: Before TOZZI, HERRING, and BURTON, Appellate Military Judges. Senior Judge TOZZI and Judge BURTON concur.

Opinion by: HERRING

Opinion

MEMORANDUM **[*2]** OPINION AND ACTION ON PETITION FOR NEW TRIAL

HERRING, Judge:

An officer panel sitting as a general court-martial convicted appellant, contrary to his pleas, of attempted murder, murder, wrongfully communicating a threat, reckless endangerment, soliciting a false statement, and

[1] The government's brief in response to appellant's assignment of errors, as well as appellant's reply brief, were revised and resubmitted to this court.

obstructing justice in violation of Articles 80, 118, and 134 Uniform Code of Military Justice, *10 U.S.C. §§ 880*, *918*, *934 (2012)* [hereinafter UCMJ]. The panel sentenced appellant to a dismissal, confinement for twenty years, and forfeiture of all pay and allowances. The convening authority approved only nineteen years confinement but otherwise approved the sentence as adjudged.

We review this case under *Article 66*, UCMJ. Appellant assigns six errors, only two of which—alleging discovery violations and ineffective assistance of counsel—merit discussion, but no relief. We have considered matters personally asserted by appellant under *United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982)*; and find that they lack merit.

BACKGROUND

In 2012, appellant and members of 4th Brigade Combat Team (BCT), 82nd Airborne Division were deployed to Afghanistan. During this time, the Chairman of the Joint Chiefs of Staff's Standing Rules of Engagement (SROE) were in effect. The SROE permitted soldiers to **[*3]** use force in defense of themselves or others upon the commission of a hostile act or the demonstration of imminent hostile intent. There were no declared hostile forces, and thus no authority to engage any person upon sight.

In June 2012, First Platoon of the BCT was situated at an outpost named Strong Point Payenzai, located near the village of Sarenzai in the Zharay district of Kandahar province. First Platoon had recently lost their platoon leader to injury from an improvised explosive device (IED), and had suffered other casualties in the months prior. Appellant, who had spent the deployment as the squadron liaison officer (LNO) at the brigade tactical operations center (TOC), was assigned to take over as the platoon leader.

On 30 June 2012, appellant, in his new role, was leading the platoon back to Strong Point Payenzai from the Troop TOC at Strong Point Ghariban. As they approached the Entry Control Point (ECP), appellant encountered an Afghan villager with a young child. The villager was asking to move some concertina wire on the road leading to Strong Point Payenzai that was impeding his ability to work on his farm. Appellant told the villager that if he touched the concertina **[*4]** wire, he and his family would be killed. Appellant conveyed the seriousness of his message by pulling back the charging handle of his weapon and pointing the weapon at the young child. Appellant ended the encounter by instructing the villager to come to his shura, a meeting, and to bring twenty people.

The next day, appellant ordered two of his soldiers to go up into one of the towers and shoot harassing fire in the general direction of villagers. Appellant told the soldiers he was doing this in order to provoke the villagers' attendance at the upcoming shura. Hearing the shots, the Troop TOC radioed Strong Point Payenzai for a report. Appellant instructed a noncommissioned officer to respond by falsely reporting the Strong Point was receiving fire.

On 2 July 2012, a mission brief was held for the platoon and their accompanying Afghanistan National Army (ANA) element before they left to go on a patrol. In this briefing, it was announced that motorcycles were now authorized to be engaged on sight, although the testimony was somewhat inconsistent with at least one soldier recalling this coming from the ANA while others identified appellant as the source of this new information. Appellant **[*5]** had posted a sign in the platoon headquarters prior to the patrol stating that no motorcycles would be permitted in the area of operations. As the platoon, with the ANA element in the lead, moved out they encountered a number of villagers near the ECP complaining about the shots from the day prior. Appellant told the villagers that they could discuss it at the upcoming shura. Appellant told the villagers to leave and then began counting down from five. The platoon began its patrol.

Not long into the patrol, Private First Class (PFC) Skelton, the Company Intelligence Support Team (COIST) member attached to the platoon headquarters element, called out to appellant that he observed a motorcycle with three passengers. PFC Skelton did not report any hostile actions, but simply that he spotted a motorcycle with three passengers in his field of view. Appellant did not ask whether the motorcycle passengers were presenting any threat. Appellant ordered PFC Skelton to engage the motorcycle. PFC Skelton complied and fired his weapon, but missed. At trial, PFC Skelton testified that he would not have fired upon the motorcycle or its passengers on his own, because "there was no reason to shoot at **[*6]** that moment in time that presented a clear, definitive hostile intent and hostile act."

Apparently in response to the impact of PFC Skelton's rounds, the motorcycle stopped, the male passengers

dismounted and began walking in the direction of the ANA unit. The ANA soldiers did not open fire, but rather gesticulated to the men, who then headed back to their motorcycle. As the three men returned to the motorcycle, appellant, over his portable radio, ordered the platoon's gun truck to engage the men. Private E-2 (PV2) Shiloh, the gunner on the 240 machine gun in the gun truck that had overwatch of the patrol, had continuous observation of the victims from after the first set of shots by PFC Skelton. Upon receiving appellant's order, Private Shiloh fired his weapon, killing two of the riders and wounding the third. The third victim ran away into the village. Prior to the engagement, the victims had no observable weapons or radios, and were not displaying any hostility toward U.S. or Afghan forces. According to PV2 Shiloh, the only reason he engaged the men was because he was ordered to do so by appellant. Following the engagement, the two deceased victims were on the ground, and the motorcycle **[*7]** was standing up, kickstand still down. Upon learning that the motorcycle was still standing, Appellant ordered PV2 Shiloh to engage and disable the motorcycle. PV2 Shiloh refused this order, noting that a young boy was nearby.

Shortly after this engagement, helicopter support came on station. The aircraft crew received a request to locate the third motorcycle rider last seen running into the village. While on station, the pilot took aerial photographs of the two deceased victims and the motorcycle. Sergeant First Class (SFC) Ayres, the platoon sergeant, linked up with appellant to find out what happened, as he had heard the shots moments before. Appellant told SFC Ayres that the aircraft had spotted the men on the motorcycle with weapons before his troops engaged.

Appellant ordered two soldiers, PFC Wingo and PFC Leon, to conduct a Battle Damage Assessment (BDA) of the deceased victims. BDAs normally entailed taking photographs, obtaining biometric data, and testing for any explosive residue on the bodies. Private First Class Skelton was the soldier trained and equipped to conduct a BDA and was also responsible for briefing the TOC afterwards. Even though PFC Skelton was standing right **[*8]** next to appellant, appellant had PFC Wingo and PFC Leon conduct the BDA, neither of whom had the training or equipment to properly perform the task. When PFC Skelton reminded appellant that he was supposed to do the BDA, appellant told PFC Skelton not to because he wouldn't like what he saw.

After the two soldiers conducted a cursory inspection of the victims, appellant told the gathered villagers to take the bodies. The soldiers did not find any weapons, explosives or communications gear on the bodies. Appellant then told the radio transmission operator (RTO) to report over the radio that a BDA could not be done because the bodies were removed before the platoon could get to them. When the RTO did not make this report, appellant took over the radio and made this report to Captain (CPT) Swanson, the Troop Commander.

After the mission, and back at Strong Point Payenzai, appellant told PFC Skelton not to include the BDA information in his upcoming brief to the TOC. Private First Class Skelton went to the TOC at Strong Point Ghariban to deliver his intelligence brief on the patrol. Upon arriving, he informed the COIST platoon leader that he needed to speak with CPT Swanson. PFC Skelton **[*9]** told CPT Swanson what happened on the patrol and that he believed they may have civilian casualties. Shortly thereafter, appellant was relieved of his duties pending an investigation into the events.

LAW AND ANALYSIS

A. Discovery Violations

HN1[↑] "*Article 46*, UCMJ, provides the trial counsel, defense counsel, and the court-martial with 'equal opportunity to obtain witnesses and other evidence in accordance with' the rules prescribed by the President." *United States v. Stellato, 74 M.J. 473, 481 (C.A.A.F. 2015)* (quoting Article UCMJ *art. 46*). The Rules for Courts-Martial elucidate the trial counsel's unique obligations in furtherance of *Article 46*'s mandate. In this case, the two pertinent provisions are: that the "trial counsel shall, as soon as practicable, disclose to the defense the existence of evidence known to the trial counsel which reasonably tends to negate...or reduce" the guilt or punishment of the accused; and that the trial counsel shall permit the defense to inspect certain items "which are within the possession, custody, or control of military authorities, and which are material to the preparation of the defense." Rule for Courts-Martial [hereinafter R.C.M.] 701(a)(6), R.C.M. 701(a)(2)(A). The former provision requires no triggering action on behalf of the defense, while **[*10]** the later provision requires a request from the defense to trigger the trial counsel's obligation, for "[w]ithout the request, a trial counsel might be uncertain in many cases as to the extent of the duty to obtain matters not in the trial counsel's

immediate possession." R.C.M. 701 analysis at A21-34. As we have stated before, the distinction between the two provisions is significant, because "whether the trial counsel exercised reasonable diligence in response to the request will depend on the specificity of the request." *United States v. Shorts, 76 M.J. 523, 530* (Army Ct. Crim. App. 24 Jan. 2017).

HN2[↑] R.C.M. 701(a)(6) is based on *Brady v. Maryland* and its progeny, which in turn, is derived from the *Due Process Clause of the Fifth Amendment*. *See generally Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963)*. *Brady* requires the prosecution to disclose evidence that is material and favorable to the defense. *Id. at 87*. This is an affirmative duty to disclose and requires no triggering action by the defense. *Strickler v. Greene, 527 U.S. 263, 280, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999)* (citing *United States v. Agurs, 427 U.S. 97, 107, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976)*). Evidence is said to be material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Kyles v. Whitley, 514 U.S. 419, 433-434, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995)*. The "duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police" has long been a recognized duty of **[*11]** trial counsel. *Id. at 437*. In order to have a "true *Brady* violation ". . . the evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Strickler, 527 U.S. at 281-82*. Courts have a responsibility to consider the impact of undisclosed evidence dynamically, in light of the rest of the trial record. *United States v. Pettiford, 627 F.3d 1223, 1229, 393 U.S. App. D.C. 283 (D.C. Cir. 2010)* (citing *Agurs, 427 U.S. at 112*). "Once a *Brady* violation is established, courts need not test for harmlessness." *United States v. Behenna, 71 M.J. 228, 238 (C.A.A.F. 2012)* (citing *Kyles, 514 U.S. at 435-36*).

With the above framework in mind, we now work through appellant's contention that the government violated its discovery obligations. Appellant asserts that the discovery request from detailed counsel was a specific request for information and not just a general request. Appellant's own brief here on appeal, as well as the actions of appellant pre-trial belie that assertion.

There is nothing in the record that supports any inference that the defense was unsatisfied with the government's response to its discovery request, such as a motion to compel. Nor is there anything that supports a finding that the defense contemplated a search of specific intelligence **[*12]** databases. Rather, the language of the discovery request reflects the typical boilerplate request for discovery, although it included the language "deceased persons." We therefore treat this as a general request for discovery and find that the exercise of reasonable diligence in response to this request did not include searching intelligence databases. ***HN3***[↑] While we have long held that the rules of military discovery are generous, we decline to now require trial counsel to seek out and search into the abyss of the intelligence community for the potential existence of unspecified information.

In addressing *Brady*, we first consider whether the information presented by appellant regarding the identities and associations of the victims was favorable to appellant. Even assuming we accept appellant's information concerning the victims as true,[2] we come to three conclusions.

First, with respect to the two deceased victims, the older victim, identified by witnesses at trial as the village elder, knew someone who was linked to hostile action against U.S. forces. The younger victim was biometrically linked to an IED incident that occurred prior to 2 July 2012. Second, the surviving victim was allegedly **[*13]** involved in hostile action against U.S. forces *after* he was wounded and his two compatriots were killed by U.S. forces on 2 July 2012. Third, and perhaps most importantly, appellant was not aware of any of this information at the time he ordered his soldiers to engage.

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[2] This court strains to accept the information presented in the video presentation (Def. App. Ex. K) at face value given that many asserted facts contained therein are not supported by trial testimony and, in fact, are directly contradicted by trial testimony. We specifically point to the purported signs that restricted motorcycles from the area. While there was testimony that such a sign was posted by appellant in the unit TOC, there was no testimony that any signs were posted in the area of Route Chilliwack, where the shootings occurred. The exhibit also asserts that air assets were on station before the shooting of the three men. The trial testimony of the pilot of the aircraft and the soldiers on the ground all have the aircraft arriving on scene after the engagement at the center of this trial. Appellant's video presentation was more an attempt at persuasive argument rather than a helpful presentation of data and link analysis of information obtained from intelligence databases.

The testimony of PFC Skelton, who first observed the motorcycle, paints a clear picture of what happened. He identified the motorcycle and three passengers, and reported that information to appellant. PFC Skelton did not report any hostile actions. Appellant did not ask whether the motorcycle passengers were presenting any threat; he simply ordered PFC Skelton to engage. PFC Skelton testified that he would not have fired upon the motorcycle or its passengers on his own, because "there was no reason to shoot at that moment in time that presented a clear, definitive hostile intent and hostile act."

The testimony of PV2 Shiloh, the 240 gunner, supports that these men posed no discernable harm. The motorcycle was parked and the three men were returning to the motorcycle at the direction of the ANA element at the time he opened fire. According to PV2 Shiloh, he engaged the three men based solely on the order from the appellant. **[*14]**

In considering any nondisclosure dynamically, as we are required to do, the evidence presented by the government on the murders and attempted murder was overwhelming. Appellant had no indications that the victims posed any threat at the time he ordered the shootings. Assuming arguendo, that the information was found and turned over to appellant before trial, we can see no scenario for the admissibility of such evidence during the trial. As stated previously, the negative information about the surviving victim was derived from actions he took after his two compatriots were shot and killed on appellant's orders. The actions of the surviving victim after the shootings would have no relevance on what appellant knew at the time he ordered the shootings. In fact, it is the more likely scenario that the government would have been able to capitalize on this aggravating evidence in presentencing by demonstrating why the SROE exist, and the direct impact on U.S. forces when the local population believe they are being indiscriminately killed. The same is true for the deceased victims. That the village elder knew someone associated with a hostile act cannot be used to infer that he posed a threat **[*15]** at that date and time. Similarly, if the other deceased victim was "linked" to a hostile act on a prior date, that is not sufficient to bring him in to the category of individuals that can be lawfully targeted under the SROE.

HN4[↑] The rules of discovery "are themselves grounded on the fundamental concept of relevance." *United States v. Graner, 69 M.J. 104, 107 (C.A.A.F. 2010)*. "None but facts having rational probative value are admissible." (quoting 1 John Henry Wigmore, *Evidence in Trials at Common Law* 655 (Peter Tillers rev. 1983)). The aforementioned information simply has no tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Military Rules of Evidence [hereinafter Mil. R. Evid.] 401. This is particularly true in this incident as the appellant had no knowledge of this information at the time he made the decision to engage.

Since we do not find that the discovered information was favorable to appellant, we need not address the nondisclosure or prejudice prongs. Consistent with our holding in *Shorts*, HN5[↑] "to comply with *Brady*, a trial counsel must search his or her own file, and the files of related criminal and *administrative investigations*. However, **[*16]** consistent with our superior court's interpretation of the issue, we require a trial counsel only exercise due diligence." *76 M.J. at 532* (citing *United States v. Simmons, 38 M.J. 276 (C.A.A.F. 1993))*. Here, we find trial counsel exercised the diligence due under *Brady* and as required under defense counsel's discovery request.

B. Ineffective Assistance of Counsel

HN6[↑] To prevail on an ineffective assistance of counsel claim, which we review de novo, an appellant must show: that counsel's performance fell below an objective standard of reasonableness; and that "counsel's deficient performance gives rise to a 'reasonable probability' that the result of the proceeding would have been different without counsel's unprofessional errors." *United States v. Akbar, 74 M.J. 364, 371 (C.A.A.F. 2015)* (quoting *Strickland v. Washington, 466 U.S. 668, 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984))*. We are also mindful that in evaluating the first *Strickland* prong, we "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland, 466 U.S. at 689*. As to our evaluation of the second *Strickland* prong, we must determine whether, absent counsel's errors, there is a reasonable probability the factfinder would have had a reasonable doubt as to appellant's guilt. *Id. at 695*.

> A court need not determine whether counsel's performance was deficient before examining the prejudice suffered **[*17]** by the defense as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's

> performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.

Id. at 697.

Even though appellant primarily focuses his claim against civilian defense counsel, for purposes of ineffective assistance of counsel claims, ***HN7***[] "the performance of defense counsel is measured by the combined efforts of the defense team as a whole." *United States v. McConnell, 55 M.J. 479, 481 (C.A.A.F. 2001)* (citing *United States v. Boone, 42 M.J. 308, 313 (C.A.A.F. 1995))*. Therefore, we consider appellant's claims in light of the defense team's performance as a unit. We also consider every claim by appellant balanced against the complete record before us, including the "experience, and abilities of trial defense counsel; the pretrial proceedings; the investigative efforts of the defense team; the selection of the court members; the trial strategy; the performance of counsel during the trial; the sentencing case; and the posttrial proceedings." *United States v. Murphy, 50 M.J. 4, 8 (C.A.A.F. 1998)*.

The record reflects that appellant was fully advised of his rights, the evidence against him, and that he substantively communicated with his defense team regularly. **[*18]** He was routinely consulted for his opinion on trial strategy, and was intimately involved with the decision making of his defense team. The trial strategy adopted by the defense, with the endorsement of appellant, was that these were combat related shootings and not orders to murder. To that end, the defense team competently pursued this theory at every stage of the proceedings. The defense team worked to portray the appellant as a "by the book" officer trying to bring discipline back to a unit that had gotten lax under its prior platoon leader. They also attempted to explain his actions as those of an aggressive young officer trying to protect his men from further harm. The defense questioned numerous government witnesses to expound on the frequent use of motorcycles by hostile elements in this area of operations. Given the overwhelming evidence against appellant, it is difficult to conceive of any other viable defense.[3]

Even had the defense team located biometric evidence pertaining to the victims, and it was somehow introduced into evidence, there is no reasonable probability that the result of the proceeding would have been different. On the contrary, had this evidence been **[*19]** presented at trial, it is likely the panel members would have considered it an aggravating factor. The fact that the surviving victim was linked to hostile action against U.S. forces only *after* his compatriots were killed illustrates that appellant's actions directly resulted in a significant adverse impact on the mission of the command. This is also supported by detailed defense counsel's affidavit when he discussed his rationale for being unable to make a site visit. That is, after the village elder was killed in this incident, the area became so kinetic that U.S. forces withdrew from there altogether.

CONCLUSION

The Petition for a New Trial is DENIED.[4] The findings of

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[3] Appellant's affidavit asserts civilian defense counsel was persistently unprepared, did not keep in contact with appellant before trial, and did not consult with appellant on, amongst other things, evidence, the pros and cons of offering a plea, the relative strength of the government's evidence, overall strategy and presentencing. This affidavit makes no mention of the efforts of appellant's military defense counsel. Civilian defense counsel and appellant's military defense counsel submitted affidavits painting a much different picture and, read together, show a defense team that kept appellant involved in each stage of his court-martial, both before and after trial. One area of agreement concerns the overall defense theme that this was a combat case, not a murder case. Under the circumstances of this case, we see no need to order a fact-finding hearing pursuant to *United States v. DuBay, 17 U.S.C.M.A. 147, 37 C.M.R. 411 (1967)*. First, even if we accept appellant's claims at face value, he has failed to show how he was prejudiced by the stated deficiencies of his defense counsel. The government presented overwhelming evidence of appellant's guilt and appellant has not shown how a different approach by defense counsel during preparation for or at trial would have resulted in a different outcome. *See United States v. Ginn, 47 M.J. 236, 248 (C.A.A.F. 1997)*. Second, appellant's focus on the performance of his civilian defense counsel to the exclusion of the efforts of his detailed defense counsel ignores our examination of the overall efforts of the defense team. In this respect, appellant's affidavit is conclusory as to his defense team's supposed ineffectiveness in that it doesn't address the many contributions and efforts of his military defense counsel in the overall effort at trial. *Id.*

[4] We note this court granted appellant's request for expedited consideration of his petition for a new trial on 13 November 2015. The basis for this petition was the same information that forms the basis for the appellant's discovery assignment of error. The parties continued to submit filings on this issue and we did not receive the last filing, appellant's revised reply brief,

guilty and the sentence are AFFIRMED.

Senior Judge TOZZI and Judge BURTON concur.

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until 21 November 2016. Thus the delay in addressing appellant's petition for a new trial.

United States v. Martinez

United States Air Force Court of Criminal Appeals

May 31, 2022[1], Decided

No. ACM 39903 (f rev)

[1] The court heard oral argument in this case on 10 December 2021.

Reporter
2022 CCA LEXIS 324 *; 2022 WL 1831083

UNITED STATES, Appellee v. Jesus MARTINEZ, Airman First Class (E-3), U.S. Air Force, Appellant

Notice: THIS IS AN UNPUBLISHED OPINION AND, AS SUCH, DOES NOT SERVE AS PRECEDENT UNDER AFCCA RULE OF PRACTICE AND PROCEDURE 30.4.

Subsequent History: Motion granted by *United States v. Martinez, 2022 CAAF LEXIS 552 (C.A.A.F., Aug. 1, 2022)*

Prior History: **[*1]** Appeal from the United States Air Force Trial Judiciary. Upon Further Review. Military Judge: Christopher M. Schumann; Andrew R. Norton (remand). Sentence: Sentence adjudged on 30 August 2019 by GCM convened at Fairchild Air Force Base, Washington. Sentence entered by military judge on 18 October 2019 and reentered on 22 June 2021: Dishonorable discharge, confinement for 6 years, forfeiture of all pay and allowances, and reduction to E-1.

United States v. Martinez, 2022 CCA LEXIS 202, 2022 WL 986174 (A.F.C.C.A., Mar. 31, 2022)

Case Summary

Overview
HOLDINGS: [1]-The record did not support a conclusion that the military judge abused his discretion in not recusing himself because there was scant support for the claim that the judge was actually biased against the defense, and the judge's conduct raised more questions about his patience than his partiality; [2]-The judge's ruling was erroneous insofar as he determined the victim's mother was unavailable under Mil. R. Evid. 804(a). Based upon the victim's testimony about the assault and appellant's own words in the following days, the denial of the victim's mother's production was harmless beyond a reasonable doubt; [3]-The judge's instructions were incorrect and appellant's conviction on the attempted sexual assault specification could not stand because the judge's instruction called for entirely circular reasoning, and the error was not harmless beyond a reasonable doubt.

Outcome
Finding of guilty as to attempted sexual assault charge and its specification set aside and dismissed without prejudice. Sentence set aside. Remaining findings affirmed.

LexisNexis® Headnotes

Constitutional Law > ... > Fundamental Rights > Criminal Process > Right to Jury Trial

Military & Veterans Law > Military Justice > Courts Martial > Trial Procedures

HN1 **Criminal Process, Right to Jury Trial**

There is no *Sixth Amendment* right to trial by jury in courts-martial. The United States Supreme Court has concluded neither the *Fifth Amendment* nor the *Sixth Amendment* creates a right to a jury in a military trial.

Criminal Law & Procedure > Preliminary Proceedings > Pretrial Motions & Procedures > Disqualification & Recusal

Military & Veterans Law > ... > Courts Martial > Judges > Challenges to Judges

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Judicial Discretion

Military & Veterans Law > ... > Courts Martial > Sentences > Deliberations, Instructions & Voting

Military & Veterans Law > Military Justice > Courts Martial > Court-Martial Member Panel

HN2 **Pretrial Motions & Procedures, Disqualification & Recusal**

An accused has a constitutional right to an impartial judge. The validity of the court-martial system depends on the impartiality of military judges in fact and in appearance. Under R.C.M. 902(a), Manual Courts-Martial, a military judge shall disqualify himself or herself

in any proceeding in which that military judge's impartiality might reasonably be questioned. Moreover, a military judge is required to disqualify himself or herself if the military judge has a personal bias or prejudice concerning a party. R.C.M. 902(b)(1). Military judges should broadly construe grounds for challenge but should not step down from a case unnecessarily. R.C.M. 902(d)(1), Discussion. A motion to disqualify a military judge may be raised at any time, and an earlier adverse ruling does not bar later consideration of the same issue, as, for example, when additional evidence is discovered. R.C.M. 902(d)(1), Discussion.

Criminal Law & Procedure > Preliminary Proceedings > Pretrial Motions & Procedures > Disqualification & Recusal

Military & Veterans Law > ... > Courts Martial > Judges > Challenges to Judges

Military & Veterans Law > Military Justice > Courts Martial > Court-Martial Member Panel

HN3[] Pretrial Motions & Procedures, Disqualification & Recusal

When considering a challenge based on the appearance of bias under R.C.M. 902(a), Manual Courts-Martial, the appellate court reviews the matter under an objective standard, asking whether a reasonable person knowing all the circumstances would conclude that the military judge's impartiality might reasonably be questioned. Once a military judge's impartiality is challenged, the court asks whether the court-martial's legality, fairness, and impartiality were put into doubt by the military judge's actions, taking the trial as a whole. Recusal in such cases is intended to promote public confidence in the integrity of the judicial process. The courts recognize a strong presumption that a judge is impartial, as well as the premise that a party seeking to demonstrate bias must overcome a high hurdle. When a military judge disclaims partiality, such a disclaimer carries great weight. Rulings and comments made by a judge do not constitute bias or partiality, unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible.

Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion

Military & Veterans Law > ... > Courts Martial > Judges > Challenges to Judges

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Judicial Discretion

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

Military & Veterans Law > ... > Courts Martial > Motions > Motions for Mistrial

HN4[] Standards of Review, Abuse of Discretion

An appellate court reviews a military judge's decision on a recusal motion for abuse of discretion. Such a decision amounts to an abuse of discretion if it is arbitrary, fanciful, clearly unreasonable or clearly erroneous, not if the reviewing court merely would reach a different conclusion. If the court concludes a military judge has abused his or her discretion in denying a recusal motion, the court determines whether to reverse a conviction by reviewing the factors established by the Supreme Court. These factors are: (1) what injustice was personally suffered by the appellant; (2) whether granting relief would foster more careful examination of possible disqualification grounds and their prompt disclosure; and (3) whether the circumstances of the case at hand would risk undermining the public's confidence in the military justice system when viewed through an objective lens.

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Appeal by United States

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Record

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

Military & Veterans Law > ... > Courts Martial > Pretrial Proceedings > Investigations

HN5[] Trial Procedures, Appeal by United States

In conducting a review under *Unif. Code Mil. Justice art. 66, 10 U.S.C.S. § 866*, military Courts of Criminal Appeals are generally limited to considering the entire record, which includes the record of trial, allied papers, and briefs and arguments presented by appellate counsel addressing matters found in either the record of

trial or allied papers. One exception to this rule covers matters submitted for the first time on appeal regarding issues raised by materials in the record but not fully resolvable by those materials.

Military & Veterans Law > Military Justice > Judicial Review

HN6[] **Military Justice, Judicial Review**

An appellant may not raise a new theory for the first time on appeal. Appellate review of a motion is limited to the motion submitted to military judge at trial, not the motion which appellate counsel wished had been submitted.

Criminal Law & Procedure > Preliminary Proceedings > Pretrial Motions & Procedures > Disqualification & Recusal

Military & Veterans Law > ... > Courts Martial > Judges > Challenges to Judges

HN7[] **Pretrial Motions & Procedures, Disqualification & Recusal**

Judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge. The question is whether those remarks reveal such a high degree of favoritism or antagonism as to make fair judgment impossible.

Military & Veterans Law > ... > Courts Martial > Judges > Challenges to Judges

Military & Veterans Law > ... > Courts Martial > Sentences > Deliberations, Instructions & Voting

Military & Veterans Law > Military Justice > Courts Martial > Court-Martial Member Panel

HN8[] **Judges, Challenges to Judges**

The correct standard for determining a judge's impartiality is whether a reasonable person knowing all the circumstances would question the military judge's impartiality. Thus, a court considers the military judge's words and actions regardless of whether they occurred before the court members or even in the courtroom at all. This is so because the appearance of fairness is tied to the public's confidence in the judicial system, a concern that reaches far beyond the deliberation room in a appellant's court-martial.

Military & Veterans Law > Military Justice > Disclosure & Discovery > Disclosure by Government

Military & Veterans Law > Military Justice > Disclosure & Discovery > Discovery by Defense

Military & Veterans Law > ... > Witnesses > Compulsory Attendance of Witnesses > Interrogation & Presentation

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Judge Advocate Review

Military & Veterans Law > ... > Courts Martial > Sentences > Presentencing Proceedings

HN9[] **Disclosure & Discovery, Disclosure by Government**

Under Unif. Code Mil. Justice art. 46(a), *10 U.S.C.S. § 846(a)*, the trial counsel, the defense counsel, and the court-marital shall have equal opportunity to obtain witnesses and other evidence pursuant to rules prescribed by the President. *10 U.S.C.S. § 846(a)*. One of those rules, R.C.M. 701(e), Manual Courts-Martial, provides that each party shall have equal opportunity to interview witnesses. Even in the absence of a defense request, trial counsel must disclose the existence of evidence known to trial counsel which tends to be exculpatory, be evidence in mitigation or extenuation, or adversely affect the credibility of any prosecution witness or evidence. R.C.M. 701(a)(6), Manual Courts-Martial. Trial counsel has the duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Military & Veterans Law > Military Justice > Disclosure & Discovery > Disclosure by Government

Criminal Law & Procedure > ... > Discovery & Inspection > Discovery Misconduct > Burdens of Proof

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Due Process

Military & Veterans Law > Military Justice > Disclosure & Discovery > Discovery by Defense

HN10[] Procedural Due Process, Scope of Protection

The suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. Evidence is favorable if it is exculpatory, substantive evidence or evidence capable of impeaching the Government's case. Impeachment evidence may make the difference between conviction and acquittal. Evidence is material when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Compulsory Process

Military & Veterans Law > Military Justice > Disclosure & Discovery > Disclosure by Government

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Compulsory Process

Military & Veterans Law > Military Justice > Disclosure & Discovery > Discovery by Defense

Military & Veterans Law > ... > Trial Procedures > Witnesses > Examination of Witnesses

HN11[] Criminal Process, Compulsory Process

An accused has the due process right under the *Sixth Amendment*, *U.S. Const. amend. VI*, to compulsory process to obtain and present witnesses to establish a defense. Under the rules promulgated by the President, each party is entitled to the production of any witness whose testimony on a matter in issue on the merits or on an interlocutory question would be relevant and necessary. R.C.M. 703(b)(1), Manual Courts-Martial. This includes the benefit of compulsory process. R.C.M. 703(a), Manual Courts-Martial. An accused's right to compel the production of witnesses for trial is not unfettered; rather, the right is tied to consideration of relevancy and materiality of the expected testimony.

Military & Veterans Law > ... > Courts Martial > Sentences > Deliberations, Instructions & Voting

Military & Veterans Law > ... > Witnesses > Compulsory Attendance of Witnesses > Interrogation & Presentation

Military & Veterans Law > Military Justice > Disclosure & Discovery > Disclosure by Government

Military & Veterans Law > Military Justice > Disclosure & Discovery > Discovery by Defense

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Posttrial Sessions

HN12[] Sentences, Deliberations, Instructions & Voting

Under R.C.M. 703(c)(2)(A) and (B), Manual Courts-Martial, the Defense is required to submit a written request for the production of witnesses to trial counsel, and that request shall include the name, telephone number, if known, and address or location of the witness such that the witness can be found upon the exercise of due diligence along with a synopsis of the expected testimony sufficient to show its relevance and necessity. Trial counsel then arranges for the production of such witnesses unless trial counsel contends production is not required—a contention the defense may challenge before a military judge. R.C.M. 703(c)(2)(D), Manual Courts-Martial.

Military & Veterans Law > ... > Courts

Martial > Sentences > Deliberations, Instructions & Voting

Military & Veterans Law > ... > Witnesses > Compulsory Attendance of Witnesses > Interrogation & Presentation

Military & Veterans Law > Military Justice > Disclosure & Discovery > Disclosure by Government

Military & Veterans Law > Military Justice > Disclosure & Discovery > Discovery by Defense

Military & Veterans Law > Military Justice > Disclosure & Discovery > Depositions & Interrogatories

HN13 **Sentences, Deliberations, Instructions & Voting**

If the military judge grants a defense motion to produce a witness, trial counsel shall produce the witness. The presence of civilian witnesses may be obtained by subpoena issued by trial counsel. R.C.M. 703(g)(3), Manual Courts-Martial. When a subpoenaed witness neglects or refuses to appear, the military judge may issue a warrant of attachment to compel that witness's attendance at a court-martial. R.C.M. 703(g)(3)(H).

Military & Veterans Law > ... > Courts Martial > Motions > Continuances

Military & Veterans Law > ... > Admissibility of Evidence > Hearsay Rule & Exceptions > Declarants Unavailable to Testify

Military & Veterans Law > ... > Witnesses > Compulsory Attendance of Witnesses > Interrogation & Presentation

Military & Veterans Law > Military Justice > Disclosure & Discovery > Depositions & Interrogatories

HN14 **Motions, Continuances**

In the event a witness is deemed unavailable, the standard for relief is not simply that the witness's testimony is relevant and necessary, but that it is of such central importance to an issue that it is essential to a fair trial, and there is no adequate substitute for such testimony. R.C.M. 703(b)(3), Manual Courts-Martial. The term unavailable is given the meaning found in Mil. R. Evid. 804(a). Under that rule, a witness is unavailable if he or she is absent from the trial or hearing and the statement's proponent has not been able, by process or other reasonable means, to procure the witness's attendance. Mil. R. Evid. 804(a)(5). Upon a showing that a witness both meets the central importance standard and is unavailable, the military judge shall grant a continuance or other relief in order to attempt to secure the witness's presence or shall abate the proceedings. R.C.M. 703(b)(3). Unavailability is determined by asking whether the witness is not present in court in spite of good-faith efforts by the Government to locate and present the witness. Government effort to produce a witness is a prerequisite to finding a witness to be unavailable.

Criminal Law & Procedure > ... > Standards of Review > Abuse of Discretion > Discovery

Military & Veterans Law > ... > Courts Martial > Judges > Challenges to Judges

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

Military & Veterans Law > ... > Courts Martial > Evidence > Evidentiary Rulings

Military & Veterans Law > ... > Courts Martial > Sentences > Deliberations, Instructions & Voting

HN15 **Abuse of Discretion, Discovery**

An appellate court reviews a military judge's rulings on discovery and production matters, as well as a military judge's selection of remedies for violations, for an abuse of discretion. The abuse of discretion standard calls for more than a mere difference of opinion. An abuse of discretion only occurs when the military judge's findings of fact are clearly erroneous, the court's decision is influenced by an erroneous view of the law, or the military judge's decision on the issue at hand is outside the range of choices reasonably arising from the applicable facts and the law.

Military & Veterans Law > ... > Courts

Martial > Evidence > Evidentiary Rulings

Military & Veterans
Law > ... > Witnesses > Compulsory Attendance of Witnesses > Interrogation & Presentation

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Judicial Discretion

HN16 **Evidence, Evidentiary Rulings**

A military judge's denial of a witness request will not amount to an abuse of discretion unless the appellate court has a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors. In the context of witness-production issues, the factors to be considered in determining whether a witness is necessary include: the issues involved in the case and the importance of the requested witness to those issues; whether the witness's testimony would be merely cumulative; and the availability of alternatives to the personal appearance of the witness. The timeliness of the defense's request may also be considered. If an appellant is entitled to the production of a witness, the erroneous denial of such production will not require relief if we are convinced the error was harmless beyond a reasonable doubt.

Military & Veterans Law > ... > Courts Martial > Judges > Challenges to Judges

Military & Veterans Law > ... > Courts Martial > Sentences > Deliberations, Instructions & Voting

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Judicial Discretion

Military & Veterans Law > Military Justice > Disclosure & Discovery > Discovery Misconduct

Military & Veterans Law > Military Justice > Disclosure & Discovery > Depositions & Interrogatories

HN17 **Judges, Challenges to Judges**

While military judges are not potted plants, they must remain impartial, and there is no error—plain or otherwise—in a military judge refraining from seeking discovery for one party's benefit when that party has not requested the military judge's help in securing it in the first place.

Military & Veterans Law > ... > Admissibility of Evidence > Hearsay Rule & Exceptions > Declarants Unavailable to Testify

Military & Veterans
Law > ... > Witnesses > Compulsory Attendance of Witnesses > Interrogation & Presentation

HN18 **Hearsay Rule & Exceptions, Declarants Unavailable to Testify**

Under Mil. R. Evid. 804(a), a witness is unavailable when she either refuses to testify about the subject matter despite an order from the military judge to do so; or when she is absent and her presence cannot be procured by process or other reasonable means.

Criminal Law & Procedure > Trials > Motions for Mistrial

Military & Veterans Law > ... > Courts Martial > Motions > Appropriate Relief

Military & Veterans Law > ... > Courts Martial > Motions > Motions for Mistrial

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Judicial Discretion

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN19 **Trials, Motions for Mistrial**

Under R.C.M. 905(f), Manual Courts-Martial, the military judge may reconsider any ruling—other than one amounting to a finding of not guilty—either upon the request of a party or sua sponte. Military judges must be sensitive to the possibility that reconsidering an earlier ruling favorable to the defense may unduly prejudice an accused or otherwise raise the question of whether a mistrial is appropriate. An appellate court reviews a military judge's decision to reconsider a ruling for abuse

of discretion.

Military & Veterans Law > Military Offenses > Attempts

HN20[] **Military Offenses, Attempts**

In charging an attempted offense under the Uniform Code of Military Justice, it is not necessary to allege the overt act or the elements of the underlying predicate, or target, offense, as long as the accused is adequately on notice of the nature of the offense.

Military & Veterans Law > ... > Courts Martial > Sentences > Deliberations, Instructions & Voting

Military & Veterans Law > ... > Trial Procedures > Instructions > Elements of the Offense

Military & Veterans Law > ... > Trial Procedures > Instructions > Special Defenses

Military & Veterans Law > ... > Trial Procedures > Instructions > Requests for Instructions

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN21[] **Sentences, Deliberations, Instructions & Voting**

Military judges have a duty to provide instructions which deliver an accurate, complete, and intelligible statement of the law. Instructions must be clear and correctly conveyed. An appellate court reviews instructions given to determine if they sufficiently cover the issues in the case and focus on the facts presented by the evidence. Whether a panel was properly instructed is a question of law reviewed de novo. Military judges are required to instruct members on the elements of charged offenses. R.C.M. 920(e)(1), Manual Courts-Martial. Instructional errors with constitutional dimensions are tested for prejudice against the standard of harmless beyond a reasonable doubt. This standard is met where a court is confident that there was no reasonable possibility that the error might have contributed to the conviction.

Military & Veterans Law > ... > Courts Martial > Sentences > Deliberations, Instructions & Voting

HN22[] **Sentences, Deliberations, Instructions & Voting**

The Department of the Army Pamphlet 27-9, Military Judges' Benchbook (10 Sep. 2014), may provide useful guidance to military judges, but military judges are not required to follow it.

Military & Veterans Law > Military Offenses > Attempts

HN23[] **Military Offenses, Attempts**

In the context of an attempt offense, the members are required to find that an appellant did do a certain act; that the act was done with the specific intent to commit an offense under the Uniform Code of Military Justice; that the act amounted to more than mere preparation; and that the act tended to effect the commission of the intended offense. Manual Courts-Martial pt. IV, para. 4.b (2016).

Military & Veterans Law > ... > Courts Martial > Sentences > Deliberations, Instructions & Voting

HN24[] **Sentences, Deliberations, Instructions & Voting**

When a military judge elects to identify particular overt acts in the instructions in a court-martial involving an offense alleged as an attempt, he or she must ensure those instructions amount to an accurate, complete, and intelligible statement of law.

Criminal Law & Procedure > ... > Inchoate Crimes > Attempt > Elements

Military & Veterans Law > Military Offenses > Attempts

Criminal Law & Procedure > ... > Acts & Mental States > Mens Rea > Specific Intent

HN25[] **Attempt, Elements**

In the context of an attempt offense, a preparatory step is, by definition, an intermediate point along a path that terminates at the ultimate destination of the intended offense. The same is true of the second element, in which the certain act must be accomplished with the specific intent to commit the intended offense, as well as the fourth element, in which the same certain act must tend to bring about the intended offense.

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Record

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN26[] Posttrial Procedure, Record

Whether a record of trial is complete is a question of law an appellate court reviews de novo.

Military & Veterans Law > Military Justice > Disclosure & Discovery > Depositions & Interrogatories

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Record

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Posttrial Sessions

Military & Veterans Law > Military Justice > Disclosure & Discovery > Disclosure by Government

Military & Veterans Law > Military Justice > Disclosure & Discovery > Discovery by Defense

HN27[] Disclosure & Discovery, Depositions & Interrogatories

Under the rules which went into effect 1 January 2019, the contents of a record of trial initially compiled at the conclusion of a court-martial no longer include a transcript of the proceedings—instead, a substantially verbatim recording of the proceedings is called for, R.C.M. 1112(b)(1), Manual Courts-Martial, a copy of which the accused is entitled to, R.C.M. 1106(c), Manual Courts-Martial. In addition to the recording, a complete record of trial includes such matters as the charge sheet, exhibits, the statement of trial results, and the judgment entered by the military judge. R.C.M. 1112(b), 1112(d)(2). The court reporter certifies the contents of the record of trial, but the military judge may certify the record if the court reporter is unable to do so. Unif. Code Mil. Justice art. 54(a), *10 U.S.C.S. § 854(a)*; R.C.M. 1112(c). If the record is found to be incomplete or defective prior to certification, the matter may be raised to the military judge for correction; after certification, the record may be returned to the military judge for correction. R.C.M. 1112(d)(2). Once the record of trial is certified, a copy is provided to the accused; however, sealed exhibits and recordings of closed sessions are omitted. Art. 54(d), UCMJ; R.C.M. 1112(e).

Military & Veterans Law > ... > Courts Martial > Sentences > Deliberations, Instructions & Voting

Military & Veterans Law > ... > Courts Martial > Sentences > Punitive Discharge

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Record

Military & Veterans Law > ... > Courts Martial > Sentences > Fines & Forfeitures

HN28[] Sentences, Deliberations, Instructions & Voting

Under the rules now in effect, a certified verbatim transcript of a record of trial shall be prepared in any court-martial in which a punitive discharge or confinement for more than six months is adjudged. R.C.M. 1114(a)(1), Manual Courts-Martial. The transcript is attached to the record of trial. R.C.M. 1114(d). This transcript, however, is not part of the original record of trial the court reporter certifies—instead, the transcript is attached to the record before the record is forwarded for appellate review. R.C.M. 1112(f)(1)(8), Manual Courts-Martial. When such a transcript is prepared, the accused and his or her counsel may be provided a copy upon request. R.C.M. 1114(b), Discussion. A copy of the entire record and attachments, which would include the transcript, shall be forwarded to a civilian counsel provided by the accused upon written request of an accused. R.C.M. 1116(b)(1)(B), Manual Courts-Martial.

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Record

HN29[] Posttrial Procedure, Record

A record of trial includes any evidence or exhibits considered by the court-martial in determining the findings or sentence. R.C.M. 1112(b), Manual Courts-Martial. Nothing in this rule requires inclusion of items never viewed or considered by a military judge on an interlocutory matter.

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Record

HN30[] Posttrial Procedure, Record

A record of trial is complete if it includes the required items listed in R.C.M. 1112(b), Manual Courts-Martial.

Military & Veterans Law > ... > Evidence > Admissibility of Evidence > Admissions & Confessions

Military & Veterans Law > ... > Courts Martial > Evidence > Evidentiary Rulings

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN31[] Admissibility of Evidence, Admissions & Confessions

An appellate court reviews a military judge's ruling that excludes evidence under Mil. R. Evid. 412 for an abuse of discretion.

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Burdens of Proof

Military & Veterans Law > ... > Evidence > Admissibility of Evidence > Sex Offenses

Military & Veterans Law > ... > Evidence > Admissibility of Evidence > Character, Custom & Habit Evidence

HN32[] Trial Procedures, Burdens of Proof

Under Mil. R. Evid. 412, evidence of an alleged victim's sexual predisposition and evidence that an alleged victim engaged in other sexual behavior is generally inadmissible. Mil. R. Evid. 412(a). The intent of the rule is to shield victims of sexual assaults from the often embarrassing and degrading cross-examination and evidence presentations common to sexual offense prosecutions. One exception to this rule is when evidence is offered to prove consent. Mil. R. Evid. 412(b)(2). A second exception is when exclusion of the evidence would violate an accused's constitutional rights. Mil. R. Evid. 412(b)(3). In order to show that the exclusion of evidence would violate an accused's constitutional rights, the accused must show that the evidence is relevant, material, and favorable to his defense, and thus whether it is necessary. The term favorable means the evidence is vital. It is the defense's burden to demonstrate an exception applies.

Military & Veterans Law > ... > Evidence > Relevance > Confusion, Prejudice & Waste of Time

Military & Veterans Law > ... > Witnesses > Compulsory Attendance of Witnesses > Interrogation & Presentation

Military & Veterans Law > ... > Evidence > Admissibility of Evidence > Sex Offenses

Military & Veterans Law > ... > Courts Martial > Evidence > Preliminary Questions

HN33[] Relevance, Confusion, Prejudice & Waste of Time

Evidence which is relevant under Mil. R. Evid. 412(b)(2) may be admissible if the military judge determines the probative value of such evidence outweighs the danger of unfair prejudice to the victim's privacy and otherwise outweighs the dangers of unfair prejudice under a Mil. R. Evid. 403 analysis. Mil. R. Evid. 412(c)(3). Evidence falling under the Mil. R. Evid. 412(b)(3) exception is not weighed against a victim's privacy and is instead only analyzed under Mil. R. Evid. 403. Evidence challenging the credibility of key government witnesses may fall under this exception.

Constitutional Law > ... > Fundamental

Rights > Criminal Process > Right to Confrontation

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Confrontation

Military & Veterans Law > ... > Trial Procedures > Witnesses > Examination of Witnesses

HN34[] **Criminal Process, Right to Confrontation**

Under the *Sixth Amendment*, an accused has the right to confront the witnesses against him or her. This right necessarily includes the right to cross-examine those witnesses, which is the principal means by which the believability of a witness and the truth of his testimony are tested. However, judges retain wide latitude to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness's safety, or interrogation that is repetitive or only marginally relevant. The test for determining whether an accused's confrontation clause rights have been violated is whether a reasonable jury might have received a significantly different impression of the witness's credibility had defense counsel been permitted to pursue his proposed line of cross-examination.

Military & Veterans Law > ... > Courts Martial > Evidence > Evidentiary Rulings

Military & Veterans Law > ... > Witnesses > Compulsory Attendance of Witnesses > Interrogation & Presentation

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Judicial Discretion

HN35[] **Evidence, Evidentiary Rulings**

Military judges may permit counsel to inquire about specific instances of a witness's conduct on cross-examination if they are probative of the witness's character for truthfulness or untruthfulness. Mil. R. Evid. 608(b). Extrinsic evidence of such is generally inadmissible. Military judge's rulings which limit cross-examination under Mil. R. Evid. 608(b) are reviewed for an abuse of discretion. However, when an error at trial is of constitutional dimensions, we assess de novo whether the error was harmless beyond a reasonable doubt.

Counsel: For Appellant: Major Jenna M. Arroyo, USAF (argued); Major Rodrigo M. Caruço, USAF; Allison R. Weber, Esquire (argued).

For Appellee: Lieutenant Colonel Matthew J. Neil, USAF; Major Alex B. Coberly, USAF; Major Brian E. Flanagan, USAF; Major John P. Patera, USAF (argued); Mary Ellen Payne, Esquire.

Judges: Before JOHNSON, KEY, and ANNEXSTAD, Appellate Military Judges. Senior Judge KEY delivered the opinion of the court, in which Chief Judge JOHNSON and Judge ANNEXSTAD joined.

Opinion by: KEY

Opinion

KEY, Senior Judge:

A general court-martial composed of officer and enlisted members convicted Appellant, contrary to his pleas, of one specification of sexual assault and one specification of attempted sexual assault, in violation of *Articles 120* and *80*, Uniform Code of Military Justice (UCMJ), *10 U.S.C. §§ 920*, *880* **[*2]** .[2] The court-martial sentenced Appellant to a dishonorable discharge, confinement for six years, forfeiture of all pay and allowances, and reduction to the grade of E-1. The convening authority has approved the sentence as adjudged.[3]

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[2] References to the punitive articles of the Uniform Code of Military Justice (UCMJ) are to the *Manual for Courts-Martial, United States* (2016 ed.). Unless otherwise specified, all other references to the UCMJ, the Military Rules of Evidence (Mil. R. Evid.), and the Rules for Courts-Martial (R.C.M.) are to the *Manual for Courts-Martial, United States* (2019 ed.).

[3] On 31 March 2022, we issued an unpublished opinion in this case. *United States v. Martinez, No. ACM 39903 (f rev), 2022 CCA LEXIS 202 (A.F. Ct. Crim. App. 31 Mar. 2022)* (unpub. op.). On 29 April 2022, Appellant moved for reconsideration of this decision with respect to whether the military judge abused his discretion by failing to recuse himself. On 2 May 2022, the Government moved for reconsideration with respect to our decision to set aside of the finding of guilty as to the Specification of Charge II, and suggested this court consider the case *en banc*. On 20 May 2022, we granted both motions for reconsideration, but we denied the Government's *en banc* suggestion after a unanimous vote against such request. After

Appellant has raised 11 issues, one of which asserts an error in the post-trial processing of Appellant's court-martial: that the convening authority erred by not taking action on Appellant's sentence as required by Executive Order 13,825, § 6(b), 83 Fed. Reg. 9889, 9890 (8 Mar. 2018), and Article 60, UCMJ, 10 U.S.C. § 860 (*Manual for Courts-Martial, United States* (2016 ed.) (2016 *MCM*)). In an earlier opinion, this court agreed with Appellant and remanded his case to the Chief Trial Judge, Air Force Trial Judiciary, for corrective action. *See* United States v. Martinez, No. ACM 39903, 2021 CCA LEXIS 250, at *7-8 (A.F. Ct. Crim. App. 21 May 2021) (unpub. op.). The convening authority subsequently approved Appellant's sentence, resulting in a new entry of judgment. With this error having been corrected, we now turn to Appellant's remaining ten issues, along with a supplemental issue raised subsequent to our first opinion on this case.

The assignments of error Appellant has raised through counsel are: (1) the military judge should have recused himself from Appellant's trial; (2) the military judge failed to take appropriate action with respect to a witness who refused to disclose contact information for another witness; (3) the military judge erred in reconsidering **[*3]** an earlier ruling; (4) the evidence is legally and factually insufficient to support Appellant's attempted sexual assault conviction; (5) the military judge should have granted a motion for a finding of not guilty with respect to the attempted sexual assault specification; (6) the military judge failed to instruct the members on the overt acts forming the basis for the attempted sexual assault offense; (7) the record of trial is defective and incomplete; (8) Appellant's record was not docketed with this court within 150 days of his sentencing; and (9) the cumulative error doctrine requires relief. Appellant personally raised a tenth issue pursuant to United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982): (10) the military judge erred in a ruling under Mil. R. Evid. 412 which prohibited the Defense from cross-examining a victim on a particular matter.[4]

Regarding Appellant's sixth assignment of error, we conclude the military judge's instructions with respect to the attempted sexual assault offense were erroneous, and we dismiss this specification without prejudice. As a result, Appellant's fourth and fifth assignments of error are moot, and we defer his eighth assignment of error until the record is returned to this court for completion of our review under **[*4]** *Article 66(d), UCMJ*, *10 U.S.C. § 866(d)*.

Appellant also personally raises as a supplemental eleventh issue his claim that the Constitution guarantees him the right to a unanimous verdict, a right not reflected in the current court-martial framework. We have carefully considered this issue as well as Appellant's ninth assignment of error and find neither warrants further discussion or relief. *See* United States v. Matias, 25 M.J. 356, 361 (C.M.A. 1987).[5]

I. Background

In August 2018, while stationed at Fairchild Air Force Base, Washington, Appellant met Ms. KT—a civilian college student who lived about 90 minutes away—through an online dating application. A few days after meeting Appellant online, Ms. KT drove to Appellant's off-base house and spent the weekend with him, during which time the two embarked upon a fast-moving and sexually intimate relationship. Ms. KT returned home

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reconsideration, we withdraw the court's 31 March 2022 opinion and substitute this opinion.

[4] We granted oral argument on the first two of Appellant's assignments of error. We further directed oral argument on two specific issues: whether we were permitted to consider matters from another court-martial in assessing whether the military judge should have recused himself; and whether the military judge erred in not ordering the production of the witness whose contact information was not disclosed in Issue (2).

[5] Appellant raises this claim under Ramos v. Louisiana, 140 S. Ct. 1390, 206 L. Ed. 2d 583 (2020), along with both the Fifth and Sixth Amendments. U.S. CONST. amend. V, VI. ***HN1***[⬆] However, our superior court has held "there is no Sixth Amendment right to trial by jury in court-smartial." United States v. Easton, 71 M.J. 168, 175 (C.A.A.F. 2012) (citations omitted); *see also* United States v. McClain, 22 M.J. 124, 128 (C.M.A. 1986) (noting that "courts-martial have never been considered subject to the jury-trial demands of the Constitution"). The United States Supreme Court similarly concluded neither the Fifth Amendment nor the Sixth Amendment creates a right to a jury in a military trial in Ex parte Quirin, 317 U.S. 1, 45, 63 S. Ct. 2, 87 L. Ed. 3 (1942). *See also* Whelchel v. McDonald, 340 U.S. 122, 127, 71 S. Ct. 146, 95 L. Ed. 141 (1950) ("The right to trial by jury guaranteed by the Sixth Amendment is not applicable to trials by courts-martial or military commissions. . . . The constitution of courts-martial . . . is a matter appropriate for congressional action."); ***Ex parte Milligan, 71 U.S. 2, 123, 18 L. Ed. 281 (1866)***; United States v. Anderson, No. ACM 39969, 2022 CCA LEXIS 181, at *56-57 (A.F. Ct. Crim. App. 25 Mar. 2022) (unpub. op.) (concluding Ramos does not create a requirement for unanimous court-martial verdicts).

Monday morning, and she and Appellant made plans to see each other the following weekend, with Ms. KT making the trip back to Appellant's house that Friday evening. Appellant and Ms. KT engaged in consensual sexual intercourse Sunday night, but at some point after Ms. KT had fallen asleep, Appellant woke her up in order to initiate further sexual conduct. Despite telling Appellant "no" **[*5]** and physically trying to prevent his advances, Appellant penetrated Ms. KT's vagina with his penis until he ejaculated; he did not use a condom.

Ms. KT spent the following day with Appellant until early in the afternoon when she drove back to her house. Before she left, the two went shopping for an emergency contraceptive, which Appellant purchased for Ms. KT. After a few days passed, she reported to civilian law enforcement that Appellant had assaulted her, and military authorities were subsequently notified. In the ensuing investigation, Air Force Office of Special Investigations agents interviewed Ms. ES—Appellant's then-wife who was seeking a divorce from Appellant. Ms. ES disclosed that Appellant had attempted to sexually assault her in the middle of July 2018, an offense which she had not previously reported.[6] Appellant was charged with, and convicted of, sexually assaulting Ms. KT and attempting to sexually assault Ms. ES. He was also charged with, but acquitted of, committing abusive sexual contact on Ms. ES.

II. Discussion

A. Military Judge Recusal

Appellant argues the military judge was biased against the lead trial defense counsel, and the military judge should have therefore **[*6]** recused himself from Appellant's court-martial. Appellant argues as a second basis for relief that the military judge should have recused himself based upon the appearance of bias on the military judge's part. As a remedy, Appellant asks us to set aside the findings and sentence. In support of his argument, Appellant cites to a number of events occurring both before and during his court-martial; we only address the most significant events raised.

1. Additional Background

a. Motion for Recusal

Appellant's court-martial began with a two-day-long motions hearing on Thursday, 22 August 2019. The trial itself started Monday, 26 August 2019, with Appellant being represented by a circuit defense counsel as lead counsel along with a more junior area defense counsel. The military judge had previously issued a scheduling order in April 2019 which set a deadline of 22 July 2019 for filing motions.

On 15 July 2019—one week before that deadline and more than a month before the motions hearing—the Defense asked the military judge via email for permission to delay filing a motion "pertaining to charging defects" until trial, because making the motion sooner "would simply allow the Government the opportunity **[*7]** to correct the defects." Alternatively, the Defense sought permission to file the motion *ex parte*. Less than ten minutes later, the military judge sent a reply email to both parties in which he denied both the Defense's request to file the motion late and the request to file the motion *ex parte*. That same day, the Defense submitted a written motion asking the military judge to reconsider his ruling. The Defense argued the military judge's scheduling order was in conflict with the Rules for Courts-Martial insofar as the order set deadlines in advance of those found in the rules.[7] The Government opposed reconsideration, and, on 20 July 2019, the military judge sent the parties an email in which he said he had reconsidered his ruling on the Defense's motion for relief from the scheduling order deadline, and he was again denying the Defense's motion as well as the proposed alternative relief of an *ex parte* filing.

The next day, the Defense submitted a motion to dismiss the attempted sexual assault charge under the theory that the charge's specification failed to state an offense. The tenor of the motion was that the specification did not provide Appellant adequate notice because it did not **[*8]** explain either how Appellant attempted to sexually assault Ms. ES or why he was unable to complete the offense. The Defense implied in the motion that by being compelled to submit the motion

[6] Appellant and Ms. ES had divorced by the time of Appellant's court-martial.

[7] Under R.C.M. 905(b)(2), a motion asserting a failure to state an offense may be resolved at any time during a court-martial. The Defense proposed serving their motion on the Government "after arraignment or empanelment, and the court can recess for however long is necessary to provide the trial counsel the opportunity to respond on the merits."

earlier than required by the Rules for Courts-Martial, there may be an appearance of the Defense "attempting to assist the Government perfect their case." The Government opposed this motion, arguing it had no obligation to allege specific acts which "amount to an attempt." Trial counsel also added in their motion this line: "General gripes about the Government's charging in this case may be therapeutic to express in a motion, but they do not give rise to the requested remedy. Had the Defense requested in a Bill of Particulars this information, it would have been theirs."[8] Trial counsel did not comment on the Defense's claim regarding the timing of the motion.[9]

During the week of 12 August 2019—that is, the week before the motions hearing—the Air Force's circuit trial and defense counsel, along with all the military trial judges, participated in the Air Force Circuit Advocacy Training workshop at Joint Base Andrews, Maryland. During the workshop, the Chief Trial Judge of the Air Force Trial Judiciary **[*9]** conducted a session with the circuit defense counsel in which he asked the counsel for their feedback with respect to the Air Force trial judges. Afterwards, the Chief Trial Judge held another session with just the trial judges, all of whom are subordinate to, and in the rating chain of, the Chief Trial Judge. In that session, the Chief Trial Judge explained that one of the circuit defense counsel had raised a concern about a military judge requiring defense counsel to disclose details of a particular motion earlier than required by the *Manual for Courts-Martial*. The military judge detailed to Appellant's court-martial participated in this session and concluded that the defense counsel in question was the circuit defense counsel in Appellant's case, and that the motion being referenced was the one he had denied a few weeks earlier. When the session concluded, the military judge approached the Chief Trial Judge and explained that the motion pertained to an ongoing court-martial and that, as a result, he was "probably going to mention it on the record."

After the workshop, but before the motions hearing, the military judge issued a written ruling on the Defense's reconsideration motion **[*10]** seeking relief from the scheduling order. The military judge's ruling denying the Defense motion was largely rooted in the prohibition of using *ex parte* communications for the purpose of gaining a tactical advantage over the other party. Because the Government would be able to withdraw defective specifications and then re-refer them to a new court-martial, the military judge reasoned that permitting the Defense to untimely file their motion would have little practical impact other than either delaying Appellant's trial or subjecting Appellant to a second court-martial. The military judge further rejected trial defense counsel's contention that they may "violate a potentially invalid modification of the [Rules for Courts-Martial] by directly ignoring a now direct requirement from this court to file the motion and serve all parties." In doing so, the military judge posited that it was a routine practice of military judges to set deadlines earlier than those found in the Rules for Courts-Martial in order to promote efficiency in the trial process. The military judge then noted that while he could not prevent the Defense from raising a motion alleging a failure to state an offense outside **[*11]** the time period specified in his scheduling order, he had "other potential remedies available," such as "addressing the alleged conduct on the record during trial" and holding counsel in contempt.

At the outset of the first day of motions, and apparently without advance notice to the parties, the military judge explained on the record what had happened at the workshop. He characterized the episode as the Chief Trial Judge "inform[ing] the group that a defense counsel had specifically complained that a military judge had issued a scheduling order and provided an additional, more specific order requiring the defense counsel to disclose the details of a defense motion." The military judge went on to state on the record that he found "expressing dissatisfaction to the Chief Trial Judge regarding a specific ruling issued by a military judge" was "problematic, to say the least," as it "may impact that military judge's independent judicial decision-making process in that case or future cases." Discussing rulings by our court and our superior court, the military judge said that "the process for expressing displeasure with the military judge's ruling" do not include "raising the complaint to **[*12]** that military judge's supervisor."[10] He also told the parties that

[8] The Defense had submitted a request for a bill of particulars, but trial counsel contended it did not specifically request information pertaining to the conduct underlying the attempt specification.

[9] The military judge later denied the motion after the motions hearing but before trial on the merits began. He concluded that Appellant was on adequate notice of the offense he was to defend against.

[10] The military judge cited *United States v. Hutchinson, No. ACM 38503, 2015 CCA LEXIS 269 (A.F. Ct. Crim. App. 29 Jun. 2015)* (unpub. op.). That case, however, dealt with government attorneys contacting a judge's supervisor

"[e]xpressing dissatisfaction with the military judge's ruling in a specific case to that military judge's supervisor is strictly prohibited."[11]

The military judge went on to explain that "[s]uch conduct could call into question the military judge's decision to reconsider or not reconsider a particular motion issue out of fear of reprisal from his judicial supervisor" or, alternatively, "that the military judge's judicial independence is in question because a decision on a motion issue has been influenced by a supervisory judge." He said doing so "places the military judge in an undesirable position of having his impartiality called into question through no fault of his own because a counsel disagrees with a judicial decision and chooses to raise that concern with the military judge's direct supervisor." The military judge explained various options for counsel to address his rulings, ultimately advising them that "[c]ontacting the military judge's supervisor to express dissatisfaction with an adverse ruling in an ongoing case is not an appropriate remedy."

After providing the foregoing guidance, the military judge described **[*13]** the circuit defense counsel's comments at the workshop as "an unfortunate misstep on the part of counsel" but which were "immaterial on the merits of this case." He explained that at the time he learned of the comments, he had ruled and already drafted—but not yet provided to counsel—his written ruling on the scheduling-order matter. He noted the Chief Trial Judge had not sought to influence the court with respect to any rulings related to Appellant's trial. He told the parties he "ha[d] no concerns with his impartiality going forward and [was] confident that his fairness cannot be reasonably questioned" and that he "will not be improperly influence[d] by this particular matter." The military judge explained he raised the matter of the workshop out of his duty to ensure the fairness of Appellant's trial as well as his concern for "absolute transparency with regard to an issue that has at least some potential to call into question the impartiality" of the court. The military judge then asked the parties if they had any questions or desired to challenge him, and circuit defense counsel answered: "No questions and no challenges."

The military judge proceeded to hear motions over the rest **[*14]** of the day and the next day, Friday, 23 August 2019, including a defense motion to compel the assistance of a computer analyst who could review data the Government had extracted from Appellant's cell phone. The Government had previously made a hard drive containing the extracted data available to the Defense, but trial defense counsel asserted they had no ability to access the contents of the drive, much less review the data. At some point after the court recessed on Friday, the military judge granted this motion and the analyst began his review. This analysis continued over the weekend with the Defense periodically providing newly discovered information to trial counsel.

On the morning of Monday, 26 August 2019, the military judge and the parties discussed proposed voir dire questions, and about ten minutes before the members were scheduled to be brought into the courtroom, trial defense counsel provided the military judge with 13 affidavits from people who had attended the advocacy workshop earlier in the month. In essence, the affidavits suggested Appellant's circuit defense counsel had not been referring to any particular case during the meeting with the Chief Trial Judge and that **[*15]** the comments were not so much a "complaint" as they were the catalyst for a discussion. Circuit defense counsel then asked to voir dire the military judge and to call the Chief Trial Judge as a witness "to determine if there's an attempt to create bias of the military judge, if the trial judge is biased against defense counsel, or if there's been [an] attempt made to chill the role of defense counsel in this case."

The military judge agreed to answer defense questions, and during the ensuing voir dire, he explained the Chief Trial Judge had never mentioned a particular counsel or a particular case, but he concluded the Chief Trial Judge was referring to Appellant's case and the detailed circuit trial counsel based upon what the Chief Trial Judge had said about the issue. The military judge further explained he felt obligated to disclose the fact the matter came up out of concern for the possible perception that he might be reviewing his decisions based upon comments made to his supervisor, even

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regarding the judge's scheduling decisions and whether, by doing so, the attorneys' conduct created the appearance of unlawful command influence.

[11] Although not entirely clear, the military judge seemed to derive this premise from *United States v. Ledbetter, 25 C.M.A. 51, 2 M.J. 37, 54 C.M.R. 51 (C.M.A. 1976)*, a case which dealt with claims that The Judge Advocate General—not a defense counsel—improperly scrutinized a judge's sentencing decisions. In *Ledbetter*, the Court of Military Appeals held "official inquiries . . . which question or seek justification for a judge's decision" were barred "unless such inquiries are made by an independent judicial commission established in strict accordance" with a 1972 American Bar Association standard—a standard which no longer appears to exist.

though the Chief Trial Judge had not told him to do or not do anything with respect to the court-martial. The military judge asserted he "will not be influenced by anybody" and that he "hold[s] **[*16]** absolutely no animus towards any counsel, ever," noting that he was "retirement eligible" and "not going to be a general officer."

The military judge did concede he might "get a little bit fired up when it comes to issues" and perhaps had been "hypersensitive" about circuit defense counsel's comments at the workshop and added, "in the future, I would love counsel, even in an academic setting, to not raise issues that are pending before any court." At one point, circuit defense counsel posed the following question:

> Noting that we sit in the same building when we're not on the road, and we never discuss ongoing cases in *ex parte* fashion. You've always had an open door to me. Our families have socialized at holiday parties. You've always invited me to sit down for conversations about the Air Force, about officership, and been a mentor to me in those things. Has any of that changed as a result of this?

The military judge answered, "No, I hope not. I hope not from your perspective." Circuit defense counsel then commented, "It hasn't."

After questioning the military judge for about 30 minutes, circuit defense counsel made an oral motion for the military judge to recuse himself from the court-martial. **[*17]** Circuit defense counsel essentially argued there was an appearance of unfairness based upon the military judge's concession of being "perhaps hypersensitive" and having concluded counsel had "complained" at the workshop, although circuit defense counsel also said, "I want to put on the record, based on the military judge's responses, and based on the affidavits, there appears to be no actual bias in this case."[12] The military judge verbally denied the motion, and the rest of the day was spent selecting court members. Once that process was complete, the members were told to report back at 0830 hours the following morning.

When the court convened the next day, Tuesday, 27 August 2019, the military judge placed his written decision on the recusal motion on the record. His ruling indicated he found that "no persuasive connection has been drawn between the military judge's raising on the record the manner in which a pending matter was addressed to the [Chief Trial Judge] and a reasonable inference of partiality."

b. Opening Statement Slides

At 0830 hours, after placing his recusal ruling on the record, the military judge asked the parties if there were any other matters to take up before calling **[*18]** the members for opening statements. At that point, trial counsel told the military judge the Government had just received a copy of the slides that the Defense intended to use in their opening, and said those slides contained "screen shots of things that are not in evidence" such as text messages between [Ms. ES] and Appellant, which trial counsel asserted had not been previously disclosed to the Government. The military judge turned to trial defense counsel and said,

> Once again, [five] minutes after the time I told the members to be here that we would get started, I'm dealing with another last minute issue. I'm just—I'm curious defense. What did you think was going to happen when you presented these slides to the [G]overnment this morning? What did you think the outcome would be? . . . What did you think was going to happen? Did you think that we were going to just roll right into the court members or did you think that they might have a concern about some of the content to [sic] this?

Trial defense counsel confirmed the text messages in the slides had been discovered in their expert's analysis over the weekend of the data the Government had seized from Appellant's phone, leading the **[*19]** military judge to ask,

> Did we or did we not discuss two or three days ago when the court granted your expert to allow you to gain access to that extraction, that there might be some issues with regard to discovery? For example, if you found anything in there that certainly you intended to introduce at trial or use at trial, you had disclosure obligations to the [G]overnment under the discovery rules under [Rule for Courts-Martial (R.C.M.)] 701, right? It's not a one-way street. It's not they have to provide you with everything and then you get to come in seven [ ] minutes after we told the members to be here and say, "Here's some stuff that we found. We're just going to give it to you now." Do you understand

[12] Circuit defense counsel did not renew his earlier request to have the Chief Trial Judge called to testify.

that?[13]

After more discussion of the matter, the military judge said,

> All right. I've heard enough. Government, how much time do you need? I'll give you as much time as you need. I'm not going to operate this trial on the fly and do things because they just keep dropping in my lap. I haven't—I haven't offered recesses yet to deal with these surprise issues but now we're going to start doing it because I'm just not going to deal with these on the fly.

The court reconvened shortly before **[*20]** noon, and the military judge said the Defense had, in fact, complied with their discovery obligations regarding the text messages. However, he concluded the Defense's use of the text messages in the opening slides "would amount to publishing an exhibit to the court members before an evidentiary ruling can be provided," and that he felt it would be "improper" to show the members the messages "without any further instruction as to how the members can consider the specific messages." As a result, trial defense counsel removed the text messages from their slides and did not reference them in the Defense's opening statement.

c. Mil. R. Evid. 412 Ruling and Opening Statements

The preceding Friday, the military judge had heard arguments on a defense motion to admit evidence under Mil. R. Evid. 412 related to Ms. KT, and he provided the parties a written ruling on Saturday.[14] One part of this motion was the Defense's request to be able to reference the specific number of times Appellant and Ms. KT allegedly had sex during their relatively short relationship, a number which we need not repeat here. The Defense's theory, as we understand it, was that Appellant and Ms. KT had rapidly escalated the intensity and intimacy of their **[*21]** relationship and were frequently engaged in sexual activity such that Appellant may have had a valid mistake of fact defense as to Ms. KT's consent during the assault. An alternative defense theory was that Ms. KT was unnerved by the speed of the relationship—in which she and Appellant were discussing marriage by their second weekend together—and she falsely claimed she had been assaulted in order to extricate herself from the relationship.[15] Trial counsel specifically objected to the admission of this evidence, arguing that the number of times the two had sex was irrelevant and it was being offered simply to paint Ms. KT as being promiscuous.[16] Ms. KT's special victims' counsel said he thought it was "completely fair" for the Defense to "ask if it was multiple times or if it was more than one time," but noted Ms. KT did not agree with the number the Defense proposed.[17] In his written ruling, the military judge ruled that the Defense *could* present evidence regarding the specific number of times the Defense alleged Appellant and Ms. KT had sex because—according to the military judge—there had been no objection from either trial counsel or

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[13] During the motions hearing regarding the Defense's motion to compel expert assistance, circuit trial counsel argued that if the Defense found "something on the phone that they wish to use, that will create additional discovery obligations" which could result in a trial delay. The military judged asked the Defense, "Have you contemplated the implications of what will likely happen through the course of the appointment of an expert[?] You go beyond the scope of what the [G]overnment searched in that extraction, what that means as far as your obligations under discovery and potentially your obligations to provide information to the United States [G]overnment that comes off of your client's phone?" Trial defense counsel replied, "Absolutely. That has been fully considered." The military judge then said, "They're going to want to look as deeply as you want to look. Do you understand that?" Trial defense counsel responded affirmatively.

[14] The pretrial motions and the transcript of the related hearing were sealed by the military judge. This opinion contains discussion of sealed material only as necessary for our analysis.

[15] This theory also relied on the fact Ms. KT and Appellant bought an emergency contraceptive for Ms. KT to use before she returned home at the end of the second weekend. The Defense sought to characterize this as a "pregnancy scare." Ms. KT described it as a precautionary measure following the assault, because Appellant had not worn a condom.

[16] Trial counsel's written response to the Defense's motion was more ambiguous on this point; they wrote: "The Government has no objection to the admission of evidence that [Appellant] and [Ms. KT] had consensual sex before the charged incident. That said, detailed testimony as to the frequency of the pre-assault consensual sex or an implication that it formed the whole basis of the relationship quickly risks running afoul of [Mil. R. Evid.] 412 and [Mil. R. Evid.] 403." The written motion did not address the specific number of times the two had sex that trial defense counsel alleged in their Mil. R. Evid. 412 motion.

[17] However, Ms. KT's special victims' counsel's written response said Ms. KT "does not object" to admission of evidence that she and Appellant had sex the specific number of times alleged by the Defense.

the special victims' counsel.[18] The military judge ruled **[*22]** the Defense *could not* present evidence either that Appellant and Ms. KT talked about having sex before they met or that they had sexual intercourse just a few hours after they did meet.

The Defense also made a motion to admit evidence under Mil. R. Evid. 412 regarding Ms. ES, Appellant's ex-wife. The military judge's ruling on that motion permitted trial defense counsel to admit evidence that Ms. ES and Appellant had been in a sexual relationship for five years, but prohibited eliciting "testimony regarding the frequency of intercourse or specific sexual acts."

In the Defense's opening statement, trial defense counsel began explaining the origins of Appellant's relationship with Ms. KT, telling the members, "They immediately start moving from [an online dating application] to talking on text message and things ramp up and intensify, intensify considerably very quickly. They get to know each other with a deep, personal, intimate level and no topic is off conversation." Trial counsel objected, saying, "[w]e have litigated this issue," and the military judge sustained the objection, telling the members to disregard trial defense counsel's "last statement." Moments later, trial defense counsel told the members **[*23]** about the first weekend Ms. KT spent with Appellant: "They go out on the town, they're drinking, they go to coffee shops, he shows her Spokane, and they have consensual sex on multiple occasions the first week." Trial counsel objected again, saying, "We have litigated this issue. Your ruling was clear." As a result, the military judge excused the members and convened an *Article 39(a), UCMJ, 10 U.S.C. § 839(a)*, session outside their presence. This session was closed to spectators other than the parties, Ms. KT, and Ms. KT's special victims' counsel.

In the session, trial counsel re-raised the first objection and said, "I don't know what exactly the defense counsel was trying to do. If he's trying to pull something over the [c]ourt; if he's trying to infer something; if it's bad faith; or just bad lawyering." Trial counsel further indicated the Government might need to evaluate whether new members would be required if the Defense "continue[d] to flaunt" the military judge's ruling. Trial counsel argued that by saying "no topic is off conversation," the Defense had violated the military judge's ruling regarding how soon Appellant and Ms. KT first had sex. Regarding the second objection, trial counsel pointed to the military **[*24]** judge's ruling prohibiting evidence of Appellant's and Ms. KT's pre-meeting discussions about having sex.[19] This led the military judge to turn to the Defense and say,

> Okay. Defense, so we had pretty extensive motions practice under [Mil. R. Evid.] 412, I've given you an 11-page ruling that was pretty detailed—I thought—with regards the left and rights, with regards to what you could and couldn't get into. I'm being as patient as I can with these types of issues that keep sort of popping up as if there's no recollection of the discussions that we've had in the past on these types of issues.

The military judge next incorrectly asserted the Defense had told the members Appellant and Ms. KT had sex just a few hours after meeting and claimed the Defense had also violated the ruling regarding Appellant and Ms. KT talking about having sex before they had met. He asked trial defense counsel, "Why are you talking about that in light of the [c]ourt's ruling on [Mil. R. Evid.] 412?" Trial defense counsel denied he made either of those statements and argued the opening statement had been consistent with the military judge's ruling. The military judge responded,

> What are you implying there with regard to "all topics, nothing was off-limits?" **[*25]** Do you mean baseball, weekends in the park? What are you talking about when you say—what's the implication that you're trying to lead with the court members when you say, before they met, they talked about all topics. Nothing was off-limits. Because, you know, we are all adults here, right? What was the implication of that? What are you trying to imply?

The Defense explained they were trying to show how quickly the relationship between Appellant and Ms. KT formed, describing that as "an incredibly crucial component to this case." The military judge said,

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[18] In paragraph 27 of the military judge's ruling, he wrote that "the Defense identified the following matters for admission . . . (e) Between on or about 17 Aug and 27 Aug 2018 [Ms. KT] and [Appellant] had consensual sex approximately [X] times." Immediately following the heading of "Admissible Without Objection," paragraph 28 states the information in paragraph 27(e) is admissible based on the absence of objection from the Government and based on the information being "relevant to the issues of consent or mistake of fact as to consent . . . and may be constitutionally required."

[19] We presume trial counsel unintentionally reversed which part of the military judge's ruling pertained to which objection.

> I'm just trying to—I don't want to believe that you're just being clever and that you're going to scrape up against the line from an implication standpoint, sort of "wink-wink, nod-nod,[ ] hey members, they talked about everything. All topics were on the table.["] I'm hoping you're not doing that. I really want to believe that that's not what's going here. [sic] But I share the [G]overnment's concern because in a matter such as this, when I've already ruled on the issue, when counsel sort of try to push the envelope on an issue that I've already ruled on to the point where I'm concerned it's going to leave an impression with the members, **[*26]** that causes me concern because I've already ruled on it. And now it's—I don't even need his objection because I've ruled on something and somebody goes against that ruling, well I kind of wonder what happened to the part where I ruled on it. Do people not care what my rulings are if they're going to sort of go around them?

The military judge turned to the objection regarding the Defense's statement that Appellant and Ms. KT had sex on multiple occasions, and he stated on the record that he would take a moment to read his written ruling. The military judge paused and then announced, "Okay, listen. I'm going to overrule the second objection." This led trial counsel to say that the Government and the Defense seemed to have "a fundamental misunderstanding" about the ruling, and that trial counsel were not asking for the military judge to reconsider his ruling, but that they would like to ask for "additional guidance or a supplemental ruling" regarding sexual conduct between Appellant and Ms. KT. In explaining this "misunderstanding," trial counsel pointed to the ruling regarding Ms. ES in which the Defense was prohibited from eliciting the "frequency of intercourse" between Ms. ES and Appellant. **[*27]**

The military judge then embarked on a lengthy explanation about how an existing sexual relationship—but not necessarily specific details of the relationship—is relevant to the issue of mistake of fact as to consent. He acknowledged his ruling did permit the Defense to elicit the number of times Appellant and Ms. KT had sex and then—somewhat mid-stream—he said, "consider this a reconsideration of the ruling to provide a little bit more clarity," and "[t]o the extent that is in-artfully drafted, consider it artfully drafted at this point forward." He then said that "no questions, no testimony, no statements regarding frequency or any implication that Ms. [KT] is a promiscuous person sexually" would be permitted. He said that although his ruling had permitted the Defense to elicit the number of times Appellant and Ms. KT had sex, he did not intend to permit an "inference that frequency of sex mattered, if that makes sense."

Before concluding the *Article 39(a), UCMJ*, session, the military judge said he was sustaining both of the Government's objections, in spite of his earlier ruling. However, when the members returned to the courtroom, the military judge neglected to inform them what his ruling was on the **[*28]** second objection.

d. Examination of Witnesses

As discussed in greater detail below in Section II.B. of this opinion, *infra*, Ms. KT declined the Defense's requests for a pretrial interview. As a result, trial defense counsel periodically indicated during trial that they were surprised by portions of her testimony. At one point during her direct examination, trial counsel elicited that the morning after the assault, Appellant attempted to initiate sexual conduct again, and Ms. KT told him "no." Trial defense counsel objected based on lack of notice and the military judge sustained the objection. Despite having objected to this evidence, circuit defense counsel elicited the exact same evidence during his cross-examination of Ms. KT and obtained her agreement that when she told Appellant "no" on this occasion, Appellant "just respected [her]." After five questions and answers on the topic, trial counsel said, "Your Honor, I understood that the [G]overnment was precluded from asking these questions." The following colloquy ensued in front of the members:

> MJ [military judge]: Yeah, I don't understand. I sustained an objection, didn't I?
>
> CDC [circuit defense counsel]: It was very important to **[*29]** the members, Your Honor, so I think—
> MJ: No it wasn't. When I sustain an objection that means it's not before the members. That means I sustained the objection. It means to disregard the question and the answer. Did I not sustain an objection on that issue?
> CDC: You . . . You—I agree. So, Your Honor,—understand. So I'm asking about now as [sic] something I just learned about as part of my expanded cross and having not had the opportunity to interview this witness.
> MJ: Well, this is no surprise because you heard it in the direct examination and then you objected to it and I sustained the objection.
> CDC: Yes. So I think it's fair game to talk about it—

> and this is by which [sic] I discovered it. I'm hearing her say it for the first time. And so had I known about it before certainly would have wanted to ask.

This led the military judge to move the discussion into an *Article 39(a), UCMJ*, session outside the members' presence at the end of which the military judge called the members back in and told them he had overruled the objection. Trial defense counsel then proceeded to ask Ms. KT about her telling Appellant "no" that morning after the assault and how Appellant respected her wishes.

Appellant contrasts this **[*30]** reaction by the military judge with an objection raised by the Defense during Ms. ES's direct testimony after trial counsel asked her if she had "made any additional allegations against [Appellant] to try to get back at him for some reason." Ms. ES answered, "No. I have not," and trial defense counsel objected. In the *Article 39(a), UCMJ*, session that followed, trial defense counsel reminded the military judge that he had denied the Defense's pretrial motion to be allowed to elicit evidence that Ms. ES *had* accused Appellant of other sexual offenses—most of which the Government had not charged Appellant with. Regarding one offense the Government had charged Appellant with, Ms. ES apparently admitted the sexual conduct in question was, in fact, consensual, and the Government withdrew that specification before trial. Thus, trial defense counsel argued, the Government had violated the ruling—or at least created a situation wherein the only way the Defense could rebut Ms. ES's claim of not making any other allegations was to cross-examine her on matters the military judge had disallowed. After a lengthy discussion, the military judge overruled the Defense's objection and refused the Defense's request for **[*31]** permission to question Ms. ES on the matter.

The military judge explained his ruling on the objection as being for Appellant's benefit, insofar as it would avoid suggesting to the members that Ms. ES had, in fact, made other allegations against Appellant. Turning to trial counsel, the military judge cautioned them to "tread lightly" and to "be more careful than ever that you don't ask certain trigger questions that trigger discussions about things that this [c]ourt's already ruled on. Okay?" When the members returned to the courtroom, the military judge failed to tell them he had overruled the Defense's objection.

Appellant also highlights that, during the Defense's cross-examination of Ms. KT, the military judge interrupted the questioning when Ms. KT and trial defense counsel began talking over each other. The military judge told trial defense counsel to "stop it," and that if it happened again he would convene an *Article 39(a), UCMJ*, session and "do some other remedies." The military judge then told trial defense counsel, "If you need to count to five—whatever trick you need to do to allow her to finish her answer, do it."

During the direct examination of another witness, the Government offered as an **[*32]** exhibit one page of phone records, a large portion of which had been redacted. Circuit defense counsel objected, explaining that he wished to have the option to question the witness about some of the obscured calls. After some discussion, the military judge convened an *Article 39(a), UCMJ*, session. Circuit defense counsel attempted to explain why he thought some of the blacked-out information was relevant, leading the military judge to apologize if it appeared that he was "getting frustrated" because he did not understand the Defense's argument as to the relevance. The following colloquy then occurred:

> MJ: Okay. Do you have a copy of this prepared that's un-redacted?
> CDC: Not prepared because—
> MJ: When did you get this?
> CDC: I've had that for weeks, Your Honor.
> MJ: You've had that for weeks, and you don't have a copy that's un-redacted?
> CDC: Not printed with me.
> MJ: Did you anticipate an objection when they gave this to you weeks ago and you thought they might use it and you didn't anticipate an objection weeks ago? You just anticipated it right now?
> CDC: I've never seen it in that form before right now.
> MJ: Hold on, you just told me you had this. Did you have this? I asked you if you had this.
>
> CDC: Oh, no. I'm **[*33]** seeing it for the first time a few minutes ago. Sorry.
> MJ: Okay. So you don't have—you didn't have the redacted version of this? When did you get the redacted version of this?
> CDC: It was as it arrived on my table today.
> CTC [circuit trial counsel]: Your Honor—and I'm sorry to interrupt the [D]efense—I will take responsibility for not ensuring that this had been provided to the [D]efense. To the extent that there was a notice issue, I will take responsibility for that, Your Honor.

In the end, the military judge overruled the Defense's objection, telling trial defense counsel that they could

offer their own version of the call log into evidence if they felt such was warranted.

e. Revisiting the Military Judge's Mil. R. Evid. 412 Ruling

Once the Government rested, the military judge convened an *Article 39(a), UCMJ*, session outside the presence of the members in order to hear several matters the Defense wished to raise, the first of which the Defense asserted was "just in an effort to protect the record for both the [G]overnment and the [D]efense." Trial defense counsel pointed to trial counsel's "bad lawyering" comment as accusing the Defense of providing Appellant with ineffective assistance and asked the military judge for **[*34]** "a finding of fact that no such ineffective assistance of counsel happened" based upon the Defense's adherence to the military judge's written ruling regarding Ms. KT.

In response, the military judge said he would "state a couple things for the record, sort of unscripted and unprepared kind of off the top of [his] head." The military judge then described litigation as a "contentious" and "emotional" process in which "things often get heated." He noted that "[c]ounsel are sometimes more well-behaved than old judges when it comes to keeping their cool" and "that sometimes we all say things or do things that we would like to grab back . . . particularly in the sort of heat of battle for lack of a better phrase." The military judge said courts and parties "tend to be . . . particularly sensitive" about matters related to Mil. R. Evid. 412 and that he knows "it's particularly difficult for counsel, [three] or [four] days later in the trial to kind of remember the left and rights of any particular given ruling."

The military judge conceded his written ruling had contained

> at least one finding of fact that made a specific reference to the number of instances. . . . But the [c]ourt recognized that while it wasn't **[*35]** the intention of the court, one implication might be that that might open the door to issues such as frequency, et cetera, regarding prior sexual behavior, which was specifically not something that the court was permitting to get into based on the state of the law.
> . . . . So certainly once the [c]ourt recognized the inclusion of that particular reference certainly did provide at least some indication that at least discussing frequency or numbers, or however you want to characterize it, was somewhat on the table, I think we went through that, we clarified that, that frequency wasn't on the table, and we moved on from there.

Addressing trial counsel's "bad lawyering" comment, the military judge described it as "a momentary lapse of hyperbole, an emotion based on a contentious issue" and not "a formal allegation against the defense of being ineffective." The military judge went on to say he had not seen anything in the court-martial "remotely close to ineffective assistance," that he had "zero concerns with the quality of the defense services that have been provided to [Appellant]," and that trial defense counsel "very zealously" represented Appellant. He then said, "[S]o that it's clear **[*36]** for the record, regardless of any frustration or intemperate comments that may have come from any source in this courtroom, the court is absolutely convinced that ineffective assistance of counsel is not a concern."

f. Closing Argument Slides

Just before giving the Government's closing argument, while the members were present in the courtroom, circuit trial counsel said he would mark a copy of the slides he intended to use as an appellate exhibit, to which circuit defense counsel said, "I have not seen them Your Honor, but if there is a printed copy, I can give it a 30 second flip." The military judge asked trial counsel if they had a copy for the Defense, but trial counsel said they did not. It is unclear from the record what happened next in the courtroom, but circuit defense counsel announced "no objection," and trial counsel proceeded with closing argument.

g. Motion for Mistrial

The members announced their verdict in the evening of 29 August 2019. The next morning, the Defense asked the military judge to declare a mistrial under R.C.M. 915. The Defense advanced two grounds: (1) inadequate notice with respect to the specification alleging an attempted sexual assault on Ms. ES (and relatedly, **[*37]** a perceived incongruity between a conviction for that offense and an acquittal for abusive sexual contact arising out of the same conduct), discussed in greater detail in Section II.D., *infra*; and (2) disparate treatment of the parties by the military judge. With respect to the second ground, trial defense counsel asserted there were "countless examples" of such

disparate treatment, but they specifically referred to three instances they believed supported their argument: (1) discovery related to opening and closing slides; (2) objections to the Defense's opening statement regarding the military judge's Mil. R. Evid. 412 ruling; and (3) selective enforcement of the military judge's scheduling order.

As to the Defense's opening-statement slides, trial defense counsel said the military judge had "admonished" the defense team "for ambushing the trial counsel by surprise" and granted "a substantial three to four hour delay" in the court-martial. Conversely, trial defense counsel argued that just before closing argument, "trial counsel in live real time before the members went to start argument and play his PowerPoint slides through the computer without providing any notice to the defense counsel about what **[*38]** was in those slides and . . . what it may have contained." The Defense argued the military judge "did not treat that act in the same way [towards the Government] that the [D]efense absorbed admonishment" with respect to the Defense's opening slides. Responding to this claim, the military judge drew a couple distinctions, noting that the Defense's slides contained matters which "were part of the discovery issue" and that trial defense counsel said they had no objection to the Government's closing slides. The military judge also contended he "didn't admonish anybody in front of the members," although he conceded he "might have given [trial defense counsel] a little bit of a hard time."

Regarding the military judge's Mil. R. Evid. 412 ruling during the Defense's opening statement, trial defense counsel said trial counsel's objections resulted in "a considerable delay within the opening statement." Moreover, trial defense counsel argued, once the military judge realized the Defense had not, in fact, violated his ruling, the military judge still "strictly cautioned defense counsel from using surreptitious language that could connote the underlying prohibited conduct from the [Mil. R. Evid.] 412 ruling." Trial defense counsel **[*39]** then pointed to the re-direct examination of Ms. ES in which trial counsel asked about matters which the military judge had prohibited the parties from raising. Trial defense counsel said the military judge's reaction "was in stark contrast to how it was dealt with just a couple of days earlier."

With respect to the scheduling order, trial defense counsel argued trial counsel filed nearly all of their motions late and submitted their proposed voir dire questions on the first day of trial, none of which gave the military judge "any concern." Yet, when the Defense sought relief from the scheduling order, trial defense counsel claimed the military judge told them to consider the order "as a direct order from the court and from a superior commissioned officer to not violate it."[20] The military judge said the reason he denied the Defense's request was because he did not want to "let one side create a strategic advantage over the other." He continued:

> I mean, if we want to re-litigate that motion then the truth of the matter is what you wanted to do was file a motion late because you mistakenly believed that they would be foreclosed from fixing an offense that failed to state an offense. It **[*40]** didn't[,] but you believed they would be foreclosed from fixing that offense and that you would therefore gain a tactical advantage. . . . I don't know where you all are getting this notion that you're being tactically disadvantaged by filing—by not being allowed to file a motion at the last minute. . . . [T]here's lots of things that didn't happen in this case that were not consistent with my scheduling order from both sides because I didn't enforce it the way I probably should have and maybe I will better in the future. But the denial was not based on preference. It was based on what you wanted to do in your motion. In my firm belief that it was going to be negative towards [Appellant] that he was going to face[—]potentially face a second trial.

Although trial defense counsel did not specifically allege the military judge was biased against the Defense, they did focus their argument on the claimed disparate treatment of the parties. The military judge reframed their argument: "I believe what you're essentially articulating is that the military judge should recuse himself because of bias." He said the court would recess and gave the Defense an hour to brief the issue in writing, saying, **[*41]** "I think there's factual distinctions between the issues that you raised but in any event I'm not inclined to put myself in a position where I have to constantly defend myself against allegations that I'm biased." Trial defense counsel subsequently submitted a written motion for a mistrial in which they stated:

> In isolation, no decision or ruling by the Court would ever come close to requiring such mistrial, but the pervasive nature of such rulings over a two week

[20] We are unable to locate in the record any instance of the military judge saying this.

> litigated trial, in context with the issue put substantial doubt in the eyes of any reviewing authority or member of the public watching this trial.

Citing R.C.M. 915, the Defense further argued that "[s]ubstantial disparate treatment between the parties is evident throughout the entire recording [sic] of trial," that "no amount of curative instructions could cure the irreparable harm of continued adverse ruling and admonishments to defense counsel in a way that so starkly contrasts how the trial counsel was treated in open court," and "[t]his suggests bias in a way that for the integrity of the military justice system, this case should be declared a mistrial."

In his written ruling, the military judge found as an "essential finding[**[*42]**] of fact" that he did not take any remedial action against the Government for their late filings "[b]ecause the Defense never raised any objections to the Court's consideration of the Government [sic] late responses until today nor articulated any prejudice because of the Government's failures." With respect to the text messages the Defense wished to refer to in their opening statement slides, the military judge found as fact that "[n]o negative action was taken by the Court towards the Defense in response to this issue, other than addressing the matter on the record," and that he sustained the Government's objection to the slides "as it amounted to publishing exhibits to the members that were not yet admitted into evidence." The military judge ruled that he "remain[ed] unconvinced that a reasonable person knowing all the circumstances—including the various court rulings in this case that have been favorable to the Defense . . . would harbor doubt as to the Court's impartiality." The judge continued,

> [T]his [c]ourt has granted several requests for reconsideration, has allowed for expanded argument on issues raised to include multiple additional argument on the same issue, has not precluded **[*43]** the Defense from raising any matter despite timeliness concerns, and has considered oral motions on potentially case or offense dispositive issues raised without written filings or accompanying legal authority.

He concluded that while some matters "and the manner in which they are raised" may "generate heated discussions," the exchanges in Appellant's trial were not so "extraordinary" that they called for either recusal or a mistrial.

The military judge ruled that the Defense had not "identified any particular ruling that indicated bias on the part of the Court," or shown that trial defense counsel were precluded from presenting any evidence or raising any objections due to timeliness concerns. He also ruled the Defense had not identified any examples of him doing something that could be perceived as assisting the Government "outside of citing anecdotal examples of interactions with counsel that the Defense argues differed in tone between the Defense and the Government, without acknowledging the context surrounding those various interactions." The military judge noted that "at no time during the course of this trial did [he] make any statement expressing concern or frustration with counsel **[*44]** and the manner in which they were presenting their case in front of the court members." He also pointed to his instruction to the members that they were to disregard any comment or expression suggesting his opinion as to Appellant's guilt.

h. Clemency Submission Addressing Military Judge Bias

The Defense reiterated its complaint that the military judge demonstrated both implied and actual bias in a clemency submission written by trial defense counsel. In that submission, trial defense counsel contended that when the mil-itary judge denied the Defense's motion for recusal, "[t]here was an uncomfortable tension in the air, based on the language, tone, body language, and facial expressions of the military judge. All in the room could observe it. Several in the gallery commented on it after the trial." Trial defense counsel argued the Defense "lost" nearly every motion submitted to the military judge and "lost objection after objection." Trial defense counsel also reiterated that the Defense's argument for recusal was based on public perception of the proceedings, and the argument for mistrial was additionally based on a claim of the military judge's actual bias against the Defense.

i. Post-Trial [*45] Matters Presented for Our Consideration

Once this case was docketed with this court, Appellant again asserted the military judge was personally biased against circuit defense counsel. In support of this contention, Appellant moved to attach a portion of a transcript from another court-martial featuring the same military judge and circuit defense counsel in which the military judge, *inter alia*, threatened circuit defense counsel with contempt proceedings for not following the

military judge's directions. Appellant argues we should overlook the fact that the prior proceeding was not raised as evidence of bias at his court-martial under the theory that circuit defense counsel was not responsible for post-trial processing in the prior case, and—as a result—circuit defense counsel "would not have [had] access" to the transcript of the prior case.

2. Law

a. Recusal of a Military Judge

HN2[] "An accused has a constitutional right to an impartial judge." *United States v. Wright, 52 M.J. 136, 140 (C.A.A.F. 1999)* (first citing *Ward v. Village of Monroeville, 409 U.S. 57, 93 S. Ct. 80, 34 L. Ed. 2d 267 (1972)*; and then citing *Tumey v. Ohio, 273 U.S. 510, 47 S. Ct. 437, 71 L. Ed. 749, 5 Ohio Law Abs. 159, 5 Ohio Law Abs. 185, 25 Ohio L. Rep. 236 (1927)*). The validity of the court-martial system "depends on the impartiality of military judges in fact and in appearance." *Hasan v. Gross, 71 M.J. 416, 419 (C.A.A.F. 2012)*. Under R.C.M. 902(a), "a military judge shall disqualify himself or herself in any proceeding in which that **[*46]** military judge's impartiality might reasonably be questioned." Moreover, a military judge is required to disqualify himself or herself if "the military judge has a personal bias or prejudice concerning a party." R.C.M. 902(b)(1). Military judges "should broadly construe grounds for challenge but should not step down from a case unnecessarily." R.C.M. 902(d)(1), Discussion. A motion to disqualify a military judge "may be raised at any time, and an earlier adverse ruling does not bar later consideration of the same issue, as, for example, when additional evidence is discovered." *Id.*

HN3[] When considering a challenge based on the appearance of bias under R.C.M. 902(a), we review the matter under an objective standard, "asking whether a reasonable person knowing all the circumstances would conclude that the military judge's impartiality might reasonably be questioned." *United States v. Sullivan, 74 M.J. 448, 453 (C.A.A.F. 2015)* (citing *Hasan, 71 M.J. at 418*). Once a military judge's impartiality is challenged, we ask whether the "court-martial's legality, fairness, and impartiality were put into doubt by the military judge's actions," taking the trial as a whole. *United States v. Foster, 64 M.J. 331, 333 (C.A.A.F. 2007)* (quoting *United States v. Quintanilla, 56 M.J. 37, 78 (C.A.A.F. 2001)*). Recusal in such cases "is intended to 'promote public confidence in the integrity of the judicial process.'" *Hasan, 71 M.J. at 418* (quoting *Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 858 n.7, 108 S. Ct. 2194, 100 L. Ed. 2d 855 (1988)*).

We recognize "a strong **[*47]** presumption that a judge is impartial," as well as the premise that "a party seeking to demonstrate bias must overcome a high hurdle." *Quintanilla, 56 M.J. at 44* (citation omitted). When a military judge disclaims partiality, such a disclaimer "carries great weight." *United States v. Harvey, 67 M.J. 758, 764 (A.F. Ct. Crim. App. 2009)* (citing *Foster, 64 M.J. at 333*) (additional citations omitted). Rulings and comments made by a judge "do not constitute bias or partiality, 'unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible.'" *Quintanilla, 56 M.J. at 44* (quoting *Liteky v. United States, 510 U.S. 540, 555, 114 S. Ct. 1147, 127 L. Ed. 2d 474 (1994)*).

HN4[] We review a military judge's decision on a recusal motion for abuse of discretion. *United States v. McIlwain, 66 M.J. 312, 314 (C.A.A.F. 2008)* (citation omitted).[21] Such a decision amounts to an abuse of discretion "if it is 'arbitrary, fanciful, clearly unreasonable or clearly erroneous,' not if [the reviewing court] merely would reach a different conclusion." *Sullivan, 74 M.J. at 453* (quoting *United States v. Brown, 72 M.J. 359, 362 (C.A.A.F. 2013)*).

If we conclude a military judge has abused his or her discretion in denying a recusal motion, we determine whether to reverse a conviction by reviewing the factors established by the Supreme Court in *Liljeberg*. *United States v. Uribe, 80 M.J. 442, 449 (C.A.A.F. 2021)* (citing *United States v. Martinez, 70 M.J. 154, 159 (C.A.A.F. 2011)*). These factors are: (1) what injustice was personally suffered by the appellant; (2) whether granting relief would foster more careful examination of possible disqualification grounds and their prompt **[*48]** disclosure; and (3) whether the circumstances of the case at hand would "risk undermining the public's confidence in the military justice system" when viewed through an objective lens. *Id.* (quoting *Martinez, 70 M.J. at 159*).

b. Consideration of Matters Outside the Record

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[21] Our superior court, the United States Court of Appeals for the Armed Forces, has specifically rejected the de novo standard for judicial recusal decisions. *United States v. Butcher, 56 M.J. 87, 90-91 (C.A.A.F. 2001)*.

HN5[] In conducting a review under *Article 66, UCMJ, 10 U.S.C. § 866*, military Courts of Criminal Appeals are generally limited to considering the "entire record," which includes the record of trial, allied papers, and briefs and arguments presented by appellate counsel addressing matters found in either the record of trial or allied papers. *United States v. Jessie, 79 M.J. 437, 440-41 (C.A.A.F. 2020)*. One exception to this rule covers matters submitted for the first time on appeal regarding issues "raised by materials in the record but not fully resolvable by those materials." *Id. at 445*.

3. Analysis

a. Post-Trial Matters Presented for Our Consideration

We begin our analysis by declining to consider the portion of the earlier trial's transcript submitted by Appellant as evidence of a claimed bias of the military judge against circuit defense counsel. Appellant's defense team thoroughly litigated the issue of the military judge's participation in Appellant's court-martial from their pretrial recusal motion through their post-findings mistrial motion **[*49]** and clemency submission. In the Defense's initial recusal motion, trial defense counsel focused solely on the appearance of bias, specifically stating, "there appears to be no actual bias in this case." By the time of the mistrial motion, trial defense counsel had broadened their argument to include actual bias against the Defense, but even then, the claimed bias was towards the Defense generally, not against circuit defense counsel himself.

We also find unavailing Appellant's claim on appeal that circuit defense counsel did not raise personal bias—as supported by portions of a transcript from proceedings in the prior court-martial—because this counsel was not responsible for handling Appellant's representation for that court-martial's post-trial processing. Whether or not circuit defense counsel possessed his own copy of the transcript from those earlier proceedings, he was indisputably present at those proceedings and therefore had personal knowledge of his interactions with the military judge. We see nothing in the record indicating circuit defense counsel intended to make a claim of personal bias, much less that he did not raise the matter because he had tried to obtain and was **[*50]** somehow denied access to a copy of the earlier proceedings. Given his statement disavowing any actual bias on the military judge's part, we think the more correct assessment is that circuit defense counsel chose not to claim the military judge was personally biased against him, and—by extension—elected not to support such a claim with evidence derived from other courts-martial.

We acknowledge the matter of the appearance of the military judge's fairness was called into question by the Defense, but that argument was never premised on the military judge's interaction with circuit defense counsel in other cases. HN6[] Appellant may not raise this new theory for the first time on appeal. *See, e.g.*, *United States v. Carpenter, 77 M.J. 285, 289 (C.A.A.F. 2018)* (noting that appellate review of a motion is limited to the motion submitted to military judge at trial, not the motion which appellate counsel wished had been submitted).[22] By disavowing the claim of personal bias at trial, we conclude Appellant not only failed to raise this argument, but that he has waived it for purposes of appellate review. Although we have authority under *Article 66, UCMJ, 10 U.S.C. § 866*, to pierce an appellant's trial waiver in order to correct a legal error, we decline to do so here. *See United States v. Hardy, 77 M.J. 438, 443 (C.A.A.F. 2018)*. In any event, the **[*51]** fact this matter was not raised in the record means Appellant may not now supplement the record with transcript excerpts from unrelated proceedings under *Jessie*.

b. Recusal

On appeal, Appellant argues the military judge should have recused himself due to "actual bias and/or appearance of partiality" in order to "ensure public confidence in the judicial process." While many aspects of the interaction between the military judge and trial defense counsel may be subject to valid criticism, we conclude the record does not support a conclusion the military judge abused his discretion in not recusing himself.

In their original recusal motion, trial defense counsel essentially disclaimed any actual bias on the military judge's part. That, as explained above, changed by the time the Defense moved for a mistrial, and Appellant's

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[22] Having carefully reviewed the record in this case, we see no indication the theory Appellant now seeks to advance on appeal was apparent from the claims he made at trial. *See United States v. Toy, 65 M.J. 405, 409 (C.A.A.F. 2008)* (concluding an alleged error—while not raised at trial—was "apparent from the context" of an issue that was raised, and was therefore arguably preserved for appeal).

actualbias argument is not entirely without basis. The record contains several instances where the military judge was squarely confrontational with trial defense counsel. One example was when the military judge admonished the Defense for disclosing text messages Monday morning that they discovered over the weekend—when the military judge had only granted the Defense's request **[*52]** for expert assistance to look for the messages the preceding Friday. The military judge's language speaks to his frustration, as he chastised the Defense for "another last minute issue," asking them "[d]id we or did we not discuss" the matter and "[w]hat did you think was going to happen?" while complaining that issues "keep dropping in my lap."

The military judge was also quick to lecture the Defense about following his rulings, asking rhetorically at one point, "Do people not care what my rulings are if they're going to sort of go around them?" This question, of course, came in the middle of a longer critique of the Defense which had been initially spurred by the military judge's erroneous recollection of his own written Mil. R. Evid. 412 ruling. Rather than admit his error, the military judge suggested the ruling was just "inartfully drafted," *sua sponte* reconsidered the ruling "to provide a little bit more clarity," and sustained two of the Government's objections to the Defense's opening statement—even though that opening statement fell within the bounds of the military judge's original ruling. In the midst of Ms. KT's cross-examination, the military judge lectured the Defense on the meaning of **[*53]** an objection being sustained and asked, "Did I not sustain an objection on that issue?" Yet, once an *Article 39(a), UCMJ*, session was convened and emotions seemed to have calmed, the military judge ruled in the Defense's favor. During another *Article 39(a), UCMJ*, session, however, the military judge essentially cross-examined trial defense counsel about why they did not have an unredacted copy of phone records on hand—an interrogation that only ended when trial counsel interjected and told the military judge they were to blame for not having earlier provided the Defense with the document trial counsel wished to admit.

Government counsel, on the other hand, largely escaped unscathed. For example, when trial counsel suggested trial defense counsel had engaged in "bad lawyering"—a comment flowing from trial counsel's incorrect recollection of the military judge's written Mil. R. Evid. 412 ruling—the military judge charitably referred to the comment as "a momentary lapse of hyperbole, an emotion based on a contentious issue." When trial counsel defied the military judge's ruling prohibiting evidence of Ms. ES's prior allegations of sexual assault, the military judge not only allowed Ms. ES's arguably false answer to stand, but he simply told **[*54]** trial counsel to "tread lightly" and "be more careful than ever."

HN7[↑] We are nonetheless mindful that "judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge." *Liteky, 510 U.S. at 555*. The question is whether those remarks "reveal such a high degree of favoritism or antagonism as to make fair judgment impossible." *Id.* We find the matter of the training workshop telling in this case. The military judge's lengthy and sharp on-the-record critique of circuit defense counsel, punctuated by invocations of questionable—if not entirely inapplicable—legal standards, seems far out of proportion to the scale of the perceived "misstep" at issue. When the Defense re-raised the matter, the military judge conceded he might have been "a little bit fired up" and "hypersensitive" about the events at the workshop. This paints a picture not of a military judge who harbored a bias against the Defense, but instead of one who was acting somewhat impulsively on occasion rather than in the calm, temperate manner judges aspire to. Based upon our review of the record, we see scant support for the **[*55]** claim that the military judge was actually biased against the Defense, and we will not conclude the military judge erred in not recusing himself on that ground.

The closer question is whether or not there was an appearance of bias—that is, whether the military judge's impartiality might reasonably be questioned. In his ruling on the mistrial motion, the military judge claimed he had not made any statement expressing concern or frustration with counsel nor had he admonished them in front of the court members. Even if this statement were accurate, this is not the standard for determining a judge's impartiality. ***HN8***[↑] The correct standard is "whether a reasonable person *knowing all the circumstances*" would question the military judge's impartiality. *Sullivan, 74 M.J. at 453* (emphasis added). Thus, we consider the military judge's words and actions regardless of whether they occurred before the court members or even in the courtroom at all. This is so because the appearance of fairness is tied to the public's confidence in our judicial system, a concern that reaches far beyond the deliberation room in Appellant's court-martial.

Considering all the circumstances present in this case,

we conclude the military judge did **[*56]** not abuse his discretion in not recusing himself, even under an "appearance of bias" standard. We arrive at this conclusion based on the fact that, notwithstanding caustic comments directed at trial defense counsel, the military judge's conduct raised more questions about his patience than his partiality. For example, the military judge seemingly assumed the worst with respect to the events of the workshop and decided to suggest on the record that the circuit defense counsel had committed professional misconduct, rather than discuss the matter in an off-the-record R.C.M. 802 conference and provide more tailored commentary in open court. However, once the Defense re-raised the issue with the military judge, his demeanor changed, and he admitted he had perhaps been "hypersensitive" about the matter. Similarly, when trial counsel objected during the Defense's opening statement, the military judge initially insinuated that trial defense counsel had intentionally flouted his ruling. When he revisited the matter, the military judge commended trial defense counsel for "very zealously" representing Appellant. That being said, the military judge also minimized trial counsel's "bad lawyering" comment **[*57]** as "a momentary lapse of hyperbole," when it was trial counsel's misreading of the military judge's written ruling and ensuing objection that gave rise to the lengthy excusal of the members in the middle of the Defense's opening statement in the first place.

Other aspects of the military judge's treatment of the Defense do give us pause. For example, the military judge's summary conclusion that trial defense counsel were prohibited from showing text messages to the members during the Defense's opening statement was seemingly untethered to the basis of the Government's objection, even if within the military judge's discretion. Notably, the exchange over this issue—in which the military judge complained of "another last minute issue"—occurred just after the military judge issued his ruling on the Defense's motion for his recusal. Later, when the Government elicited Ms. ES's arguably false claim that she had not made any other allegations against Appellant—a matter which was the subject of a pretrial ruling adverse to the Defense—the military judge not only did not rebuke trial counsel, but he prohibited the Defense from challenging Ms. ES on that point. The military judge said he based **[*58]** this conclusion on his view that such a challenge would work to Appellant's disadvantage. While one could chalk these instances up to debatable decisions, one could also legitimately ask whether a reasonable person might conclude the military judge's impartiality could be questioned.

Contrary to Appellant's argument, we do not place much stock in certain events he points to on appeal, such as the Defense's last-minute review of the Government's closing-argument slides. From our review of the record, trial defense counsel offered to quickly review the slides on the spot, and they did so. The Defense did not object or ask for an *Article 39(a), UCMJ*, session or seek any other remedy, so we see nothing that would illuminate our analysis of the military judge's decision not to recuse himself. Similarly, the alleged "selective enforcement" of the scheduling order is insufficiently supported by the record before us. To the extent Appellant is trying to point to the Defense's request to file their failure to state an offense motion only after trial commenced, we conclude the military judge was on firm legal footing and well within his discretion in denying that request.

While we may see indications of an annoyed **[*59]** or brusque military judge, we see less to support the notion of actual deep-seated antagonism towards the Defense. Reasonable observers could question whether this court-martial was carried out in an exemplary fashion, but we conclude that—on balance—the military judge's conduct would not give rise to a reasonable person concluding his impartiality might reasonably be questioned. His conduct did not rise to the level that would undermine the court-martial's legality and fairness, and we therefore decline to find the military judge abused his discretion in not recusing himself.

Even if we had concluded the military judge should have recused himself from Appellant's court-martial, we would not grant Appellant relief based upon our analysis of the *Liljeberg* factors. First, Appellant points to only a few examples of injustice he personally suffered. Trial defense counsel were denied the ability to display text messages to the members during their opening statement, even after satisfying their discovery obligations. The Defense's opening statement was also derailed for a period of time based upon trial counsel's objection and the subsequent confusion over and discussion about the military judge's **[*60]** written ruling. Beyond these examples, however, Appellant argues less that he was personally prejudiced by adverse rulings and more that his trial might seem unfair to an outside observer. We may not endorse the tone of the entire court-martial, but even caustic comments towards counsel are qualitatively different from incorrect adverse rulings with prejudicial impacts. Our review of the record reveals comparatively few instances of the latter and no indication that the errors we do find were the result of this particular military judge's service on Appellant's court-martial.

Regarding the second *Liljeberg* factor, we see little indication that granting relief in this case would result in other military judges more carefully examining their own possible grounds for disqualification. We make this assessment based upon the fact that if the military judge here should have recused himself, he should have done so under an appearance of bias standard. Given the highly context-specific analysis that standard calls for, we are unconvinced that granting relief under the unique facts presented here would provide other judges with much useful guidance for assessing their own conduct in other cases. Instead, **[*61]** we believe military judges will be mindful of our above analysis and be vigilant for the appearance of bias even in the absence of Appellant being granted relief.

Finally, under the third *Liljeberg* factor, we see little risk of undermining the public's confidence in the military justice system for many of the same reasons we determine that a reasonable person is not likely to conclude the military judge's impartiality might reasonably be questioned. We think that while the public may rightfully have high expectations for the military justice system, the public must also recognize that it is an adversarial system comprised of imperfect human beings—one in which counsel and military judges will invariably debate and disagree with each other. Demonstrations of impatience or criticism by the military judge in this case are simply inadequate to give rise to an objective risk of undermining the public's confidence in the overall justice system.

B. Ms. KT's Refusal to Disclose Contact Information

On appeal, Appellant argues the military judge abused his discretion by permitting Ms. KT to testify without first compelling her to either provide contact information for her mother or, alternatively, answer **[*62]** questions in support of the Defense's motion to compel her mother's production.

1. Additional Background

One of the Defense's theories was that Ms. KT only alleged she had been sexually assaulted after she talked to her mother. Specifically, the Defense alleged that Ms. KT spent the weekend as well as the morning and early afternoon of Monday, 27 August 2018, with Appellant before driving back home. Over the course of several hours, Ms. KT continued to exchange affectionate text messages with Appellant and discussed her plan to spend time with Appellant the upcoming weekend. That night, Ms. KT texted Appellant—apparently in response to an incoming phone call from him—stating that she was talking to her mother. The following morning, Ms. KT texted Appellant that she "just need[ed] time." About three hours later, she texted him that she felt "super disrespected." This led to a response from Appellant in which he said, *inter alia*, "I got carried away and I'm so sorry for what happened. . . . I regret everything. This is the biggest mistake I've ever made. . . . It'll take time to heal and I know that. I don't expect you to be over this right now." Over the following days, Ms. KT expressed **[*63]** her frustration with Appellant and the impact his actions had on her, while Appellant made significant additional admissions about the assault.

The Defense postulated that it was after Ms. KT's Monday-night conversation with her mother that Ms. KT's attitude towards Appellant shifted dramatically. Ms. KT, however, refused to be interviewed by trial defense counsel prior to trial. The Defense requested Ms. KT's mother's contact information in discovery, but trial counsel maintained they did not have it. Upon receiving the Defense's request, the Government sought the contact information from Ms. KT, but Ms. KT—through her special victims' counsel—declined to provide it. Government agents attempted to assist the Defense in this endeavor by providing possible phone numbers for Ms. KT's mother, but none of the numbers was valid. As a result, the Defense had little else other than the text message to confirm or refute their understanding of when Ms. KT spoke with her mother.

On 21 August 2018—the day before the motions hearing began—the Defense made a motion to compel the production of Ms. KT's mother via subpoena and to abate of the proceedings until Ms. KT agreed to interview with the Defense. **[*64]** [23] During the hearing on this motion, trial defense counsel indicated they wished to call Ms. KT to testify. Circuit trial defense counsel also said he did not intend "to call her to interview her," and that perhaps the military judge would "accept the proffer from her counsel that she won't talk to [the Defense]." He continued: "So I don't know if the [c]ourt needs to hear from her saying she won't talk to me, but we have an issue in which—there some [sic] evidence in conversation with her mother happens [sic] both very approximate [sic] in time to the charged

[23] Nothing in the record indicates that the Defense requested the Government produce Ms. KT's mother for trial prior to making this motion.

event." After some discussion, the following colloquy occurred:

> MJ: All right. But you don't actually know what, if anything, she discussed with her mother?
> CDC: I don't. I haven't spoken with mother and I haven't spoken with [Ms. KT].
> MJ: And so you want to call [Ms. KT] to find out what she talked about with her mother?
> CDC: Yes.
> MJ: And if she says on the stand, I never talked to my mother that night. I was lying to him.
> CDC: Yes. And instead we have an impeachable statement, but it doesn't help me with producing the mother. You're right.
>
> MJ: Sure. And it doesn't help—I'm not here to help build impeachable statements either. I mean, **[*65]** if we don't know what she's going to say, then we don't know if she's going to be helpful to me in the analysis of whether or not you've met your burden of production of mother. That's really what it's all about. But you haven't—I understand you haven't spoken to [Ms. KT] and that's another discussion. But I understand that you want to talk to someone to find out what that conversation was with mom but you have no idea what they are [sic] she talked about.
> CDC: Well—
> MJ: You're speculating that there was discussion post-alleged assault that then led to [Ms. KT] taking some certain action—breaking up with the accused, et cetera—and you believe that mother may have said something to [Ms. KT] that caused her to suddenly change her attitude towards the accused, but you don't know that for sure.
> CDC: I have—well, I don't know for sure, but I have a very good faith basis to believe it because [Ms. KT's father] says, mom called me and told me that [Ms. KT]—something happened to her, and that's why you need to call her.
> MJ: So the father said that the mother called him and said call her because she just told me something happened.
>
> CDC: Yes, Your Honor. So that's my good faith basis, not just that **[*66]** this content was discussed but when it was discussed, because of where [Ms. KT's father]—what he says about the conversation and when he places it.
> MJ: Okay. And you're being told that the contact information is—the family is not willing to provide you with the contact information?
> CDC: Yes, Your Honor. . . .
>
> . . . .
> MJ: Okay. So the relevance is essentially—the defense theory is that it's potential impeachment evidence. That's the relevance of [Ms. KT's] mother because there's at least some indication that the alleged victim was in a certain positive frame of mind—however you want to characterize it—with the accused. Post-offense, she spoke to her mother then immediately thereafter, things turned. And the theory being is that something that mom said to her or implied to her caused her to change and then ultimately report an offense?
> CDC: Yes, sir.

Before moving on to the next motion, the military judge asked, "Anything further on [Ms. KT's] mother?" Trial defense counsel answered, "In terms of argument or evidence, Your Honor?" The military judge replied,

> Just argument. I mean I think I've got the gist of the relevance. I think you do have a bit of a problem in that you don't know what she's **[*67]** going to say. So relevance, in the traditional sense, I'm not sure 100 percent that you've established relevance because you don't know what she's going to say. I get that that's not your fault, but ultimately it is [a] factor to consider in the analysis. But I do believe you've raised a valid theory as to why she might be relevant on the issue of motive, bias, impeachment, et cetera. So I'll consider all that, but ultimately I see this as a witness production issue [ ] so I'll analyze that through that particular lens.

Although the Defense conceded the military judge had no authority to compel Ms. KT to submit to a pretrial interview, trial defense counsel argued the proceedings should be abated until Ms. KT agreed to a defense interview due, in part, to the fact Ms. KT had been interviewed by trial counsel. The military judge declined to abate the proceedings on this ground, finding there was no indication the Government had done anything to impede the Defense's access to Ms. KT. The military judge did direct trial counsel to continue to encourage Ms. KT to interview with the Defense, and he said he would consider such remedies as allowing the Defense some period of time after her **[*68]** direct testimony to prepare for cross-examination as well as greater latitude in that cross-examination.

The military judge further ruled he would not order the production of Ms. KT's mother, whom he treated as an unavailable witness. He invoked the standard for production of an unavailable witness under R.C.M.

703(b)(3), which relates to witnesses deemed unavailable under the meaning of Mil. R. Evid. 804(a). Under this standard, a military judge shall grant relief when the testimony of an unavailable witness "is of such central importance to an issue that it is essential to a fair trial, and . . . there is no adequate substitute for such testimony." R.C.M. 703(b)(3). The military judge said Ms. KT's mother's testimony was "being raised under an impeachment theory, and only to the extent that it would provide [Ms. KT] with a motive to fabricate or be some evidence of bias." He concluded the Defense had not met the R.C.M. 703(b)(3) "central importance" standard, "even assuming [Ms. KT] did discuss the alleged assault with her mother and then changed her tone towards [Appellant] after that conversation." He based this conclusion on the fact that in the text messages, Appellant was "apologizing for his conduct in a manner that could constitute consciousness **[*69]** of guilt;" that Ms. KT's mother's testimony would only be relevant for impeachment if Ms. KT denied speaking to her mother; and that Ms. KT's mother's testimony was unnecessary to establish motive or bias, because the Defense already had the text message. The military judge explained: "The timing of the text message reference to a conversation with her mother provides the [D]efense with the opportunity to explore this issue on cross-examination . . . to demonstrate on the part of [Ms. KT] a possible bias or motive to fabricate." The military judge also concluded the Defense had failed to meet their burden "to provide the witness[']s name, contact information and a synopsis of her expected testimony" under R.C.M. 703(c)(2)(B)(i).[24]

Just before opening statements, the military judge returned to the issue of Ms. KT refusing to interview with the Defense and asked trial defense counsel for their "proposed remedies." The Defense suggested a recess for Ms. KT to reconsider submitting to an interview; that the military judge personally encourage her to be interviewed; being afforded "expanded cross," to include asking Ms. KT about her refusal to interview with the Defense and her "refusal to provide access to other **[*70]** witnesses in this case to include her mother;" and the military judge giving an instruction to the members on the matter.[25] The military judge said he would permit "a reasonable inquiry on cross examination into the fact that [Ms. KT] declined to submit to a pretrial interview and that she did not wish for her mother to meet with [the D]efense for an interview." He further said he would entertain a request for a 30-minute recess after Ms. KT's direct testimony to permit the Defense to prepare for her cross-examination.

In the Defense's opening statement, trial defense counsel told the members the events regarding Ms. KT "turn[ed] from a misunderstanding to a criminal investigation" once Ms. KT talked to her mother after she returned home from visiting Appellant. Trial defense counsel said that it was after the call when "the tone changes" and "[i]t's no longer a mistake. Now it's an accusation." He told the members they would not be hearing from Ms. KT's mother.

When Ms. KT took the stand, her testimony ran counter to the Defense's theory about the timing of her call with her mother. Ms. KT testified on direct that she first talked to her mother and disclosed the assault as she drove home **[*71]** from Appellant's house and not at some later point, as the Defense had posited during their opening statement. On cross-examination, Ms. KT further testified she had lied to Appellant when she texted him that she was talking to her mother, and she was actually talking to a friend of hers at the time. She explained she felt Appellant was less likely to question her choosing to talk to her mother instead of him, versus than if she was merely talking to a friend. Ms. KT also conceded she hid her mother's contact information from the Defense and asked her father to do the same. Trial defense counsel did not ask Ms. KT to provide that contact information while she was on the stand, nor did they ask the military judge to direct Ms. KT to disclose it.

After the Government rested, the Defense moved to strike Ms. KT's testimony or, alternatively, to dismiss the specification alleging Appellant had sexually assaulted her. The Defense said their alternate request was rooted in an alleged violation of *Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963)*. The Defense accused the Government of not revealing that Ms. KT had lied to Appellant in her text message when she said she was talking to her mother. The Defense also argued that even if the Government **[*72]** was unaware Ms. KT had lied to Appellant about whom she

[24] The military judge further said: "Defense has provided no legal authority, nor could the court find any legal authority to support the proposition that the [D]efense is entitled to the relief requested when they are unable to discover through their own reasonable efforts information sufficient to meet their burden under [R.C.M.] 703 when there is no evidence of government interference."

[25] The Defense indicated a draft instruction would be prepared at a later point in time.

was talking to, the Defense was blindsided by this testimony, resulting in undue prejudice to Appellant because the theory the Defense advanced to the members in the opening statement had been squarely undermined. The Defense also suggested Ms. KT had been able to modify her testimony after hearing the Defense explain their theory during the motions hearing.

In discussing the matter with the military judge, trial defense counsel conceded they did not know whether or not trial counsel were aware that Ms. KT was not actually talking to her mother when she texted Appellant that she was. Trial counsel said they did not recall asking Ms. KT about the text message and were "not tracking that [they] even talked with her about that message, let alone knew that there was some dishonesty there." The military judge found there had been no violation of *Brady*, saying, "I don't believe the [G]overnment specifically knew that the witness was going to say that[,] she may have just never been asked by anyone," and that there was no evidence the Government withheld or failed to turn over any evidence.

The military judge reminded the Defense that he had **[*73]** no authority to compel Ms. KT to submit to a pretrial interview and that Appellant's constitutional confrontation rights were satisfied by virtue of Ms. KT testifying. He then said that the Defense had approached their opening statement "with eyes wide open"—that is, they knew they had not been able to interview Ms. KT or her mother to confirm the two of them actually had a conversation at the time the Defense believed they had. Although the military judge said he recognized Ms. KT had undermined the Defense's theory, such did not warrant striking her testimony—especially in light of the fact he had granted trial defense counsel additional time after the direct examination to prepare their cross-examination.

In the Defense's closing argument, trial defense counsel told the members:

> Reasons for reporting. We hear for the first time, she talked to her mom on the way home . . . she was trying to figure out what to do . . . . And she talks to her dad and there is an important intervening step that I hope you picked up her dad does not hear what happens. Dad gets a text from a mysterious, unheard from mother. And what it says is you need to talk to your daughter. And so this first version **[*74]** what happens, this first version of what she says, he never got to hear. The Government did not present it to you.

At this point, trial counsel said, "Objection, Your Honor, it is improper argument." The military judge sustained the objection and told the members to recall his instruction that they "are to consider the evidence that is properly before [them] when considering whether or not the Government has met their burden in this case." Trial defense counsel then continued, "And what you heard from [Ms. KT] is that she hid her. Among other things hid in this investigation, she hid her."

2. Law

a. Discovery

HN9[↑] Under *Article 46(a), UCMJ*, "the trial counsel, the defense counsel, and the court-marital shall have equal opportunity to obtain witnesses and other evidence" pursuant to rules prescribed by the President. *10 U.S.C. § 846(a)*. One of those rules, R.C.M. 701(e), provides that each party shall have "equal opportunity to interview witnesses." Even in the absence of a defense request, trial counsel must disclose "the existence of evidence known to trial counsel" which tends to be exculpatory, be evidence in mitigation or extenuation, or "[a]dversely affect the credibility of any prosecution witness or evidence." R.C.M. 701(a)(6). Trial counsel has the **[*75]** "duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." *Kyles v. Whitley, 514 U.S. 419, 437, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995)*.

HN10[↑] "[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady, 373 U.S. at 87*. "Evidence is favorable if it is exculpatory, substantive evidence or evidence capable of impeaching the [G]overnment's case." *United States v. Behenna, 71 M.J. 228, 238 (C.A.A.F. 2012)* (citations omitted). Impeachment evidence "may make the difference between conviction and acquittal." *United States v. Bagley, 473 U.S. 667, 676, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985)*. Evidence is material "when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." *Smith v. Cain, 565 U.S. 73, 75, 132 S. Ct. 627, 181 L. Ed. 2d 571 (2012)* (quoting *Cone v. Bell, 556 U.S. 449, 470, 129 S. Ct. 1769, 173 L. Ed. 2d 701*

(2009)).

b. Production

HN11[↑] An accused has the due process right under the Sixth Amendment[26] to compulsory process to obtain and present witnesses to establish a defense. Washington v. Texas, 388 U.S. 14, 18-19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967). Under the rules promulgated by the President, "[e]ach party is entitled to the production of any witness whose testimony on a matter in issue on the merits or on an interlocutory question would be relevant and necessary." R.C.M. 703(b)(1). This includes "the benefit of compulsory process." R.C.M. 703(a). An accused's **[*76]** right to compel the production of witnesses for trial is not unfettered; rather, the right is tied to "consideration of relevancy and materiality of the expected testimony." United States v. Carpenter, 24 C.M.A. 210, 1 M.J. 384, 385, 51 C.M.R. 507 (C.M.A. 1976) (citations omitted).

HN12[↑] Under R.C.M. 703(c)(2)(A) and (B), the Defense is required to submit a written request for the production of witnesses to trial counsel, and that request "shall include the name, telephone number, if known, and address or location of the witness such that the witness can be found upon the exercise of due diligence" along with "a synopsis of the expected testimony sufficient to show its relevance and necessity." Trial counsel then arranges for the production of such witnesses unless trial counsel contends production is not required—a contention the defense may challenge before a military judge. R.C.M. 703(c)(2)(D).

HN13[↑] If the military judge grants a defense motion to produce a witness, trial counsel shall produce the witness. *Id.* The presence of civilian witnesses may be obtained by subpoena issued by trial counsel. R.C.M. 703(g)(3). When a subpoenaed witness neglects or refuses to appear, the military judge may issue a warrant of attachment to compel that witness's attendance at a court-martial. R.C.M. 703(g)(3)(H).

HN14[↑] In the event a witness is deemed "unavailable," the standard **[*77]** for relief is not simply that the witness's testimony is relevant and necessary, but that it "is of such central importance to an issue that it is essential to a fair trial, and . . . there is no adequate substitute for such testimony." R.C.M. 703(b)(3). The term "unavailable" is given the meaning found in Mil. R. Evid. 804(a). Under that rule, a witness is unavailable if he or she "is absent from the trial or hearing and the statement's proponent has not been able, by process or other reasonable means, to procure" the witness's attendance. Mil. R. Evid. 804(a)(5). Upon a showing that a witness both meets the "central importance" standard and is unavailable, "the military judge shall grant a continuance or other relief in order to attempt to secure the witness'[s] presence or shall abate the proceedings . . . ." R.C.M. 703(b)(3). Unavailability is determined by asking "whether the witness is not present in court in spite of good-faith efforts by the Government to locate and present the witness." United States v. Cabrera-Frattini, 65 M.J. 241, 245 (C.A.A.F. 2007) (quoting United States v. Cokeley, 22 M.J. 225, 228 (C.M.A. 1986)). Government effort to produce a witness is a prerequisite to finding a witness to be unavailable. *Id.* (citing Barber v. Page, 390 U.S. 719, 724-25, 88 S. Ct. 1318, 20 L. Ed. 2d 255 (1968)).

HN15[↑] We review a military judge's rulings on discovery and production matters, as well as a military judge's selection of remedies for violations, **[*78]** for an abuse of discretion. United States v. Stellato, 74 M.J. 473, 480 (C.A.A.F. 2015) (citations omitted) (reviewing military judge's ruling finding discovery violations); United States v. Breeding, 44 M.J. 345, 349 (C.A.A.F. 1996) (citation omitted) (reviewing military judge's denial of request for production of witnesses); Cokeley, 22 M.J. at 229 (citation omitted) (reviewing military judge's determination of witness availability). "The abuse of discretion standard calls for more than a mere difference of opinion." United States v. Wicks, 73 M.J. 93, 98 (C.A.A.F. 2014) (internal quotation marks and citation omitted). An abuse of discretion only occurs "when [the military judge's] findings of fact are clearly erroneous, the court's decision is influenced by an erroneous view of the law, or the military judge's decision on the issue at hand is outside the range of choices reasonably arising from the applicable facts and the law." United States v. Miller, 66 M.J. 306, 307 (C.A.A.F. 2008) (citations omitted).

HN16[↑] A military judge's denial of a witness request will not amount to an abuse of discretion unless we have "a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors." United States v. Houser, 36 M.J. 392, 397 (C.M.A. 1993) (internal quotation marks and citations omitted). In the context of witness-production issues, the factors to be

[26] U.S. Const. amend. VI.

considered in determining whether a witness is necessary **[*79]** include: "the issues involved in the case and the importance of the requested witness to those issues; . . . whether the witness's testimony would be merely cumulative; and the availability of alternatives to the personal appearance of the witness." *United States v. McElhaney, 54 M.J. 120, 127 (C.A.A.F. 2002)* (citations omitted). The timeliness of the defense's request may also be considered. *Id.* (citations omitted).

If an appellant is entitled to the production of a witness, the erroneous denial of such production will not require relief if we are convinced the error was harmless beyond a reasonable doubt. *United States v. Shelton, 62 M.J. 1, 3 (C.A.A.F. 2005)* (citing *United States v. Powell, 49 M.J. 220, 225 (C.A.A.F. 1998)*).

3. Analysis

a. Compelling Ms. KT to Answer Questions

The thrust of Appellant's argument on appeal is that Ms. KT improperly withheld her mother's contact information from the Defense and that the military judge erred in allowing her to testify without first disclosing that information. Appellant also argues that although Ms. KT was not a party to the court-martial, she "should be viewed as a party, or at the very least, a quasi-party, to the proceeding" based upon the rights afforded to crime victims—and she was therefore bound by discovery rules.

Analysis of Appellant's allegation of error is complicated by the fact that Appellant **[*80]** does not precisely identify what the error was or who committed it. In his pleadings before this court, Appellant framed this assignment of error as the military judge erring by "failing to compel [Ms. KT] to answer relevant questions to remedy her obstruction of access to witnesses and evidence." Yet, at no point during Appellant's court-martial did the Defense ask the military judge to compel Ms. KT to answer any particular questions. When Ms. KT testified during the trial, she admitted she had withheld information from the Defense and that she had urged her father to do the same. But Ms. KT did not refuse to answer any questions put to her, nor did the Defense ask the military judge to compel her to answer any.

During the earlier motions hearing, the Defense sought two forms of relief regarding Ms. KT via written motion: (1) to abate the proceedings on the specification related to Ms. KT until Ms. KT agreed to be interviewed by the Defense, and (2) to order the Government to subpoena Ms. KT's mother for trial. As to the first form of relief, the Defense's argument was that Ms. KT had agreed to be interviewed by the Government while declining to be interviewed by the Defense, thereby **[*81]** depriving the Defense of the equal opportunity to interview witnesses. Despite conceding the military judge had no authority to compel such an interview, the Defense asked him to abate the proceedings until she submitted to an interview. The motion did not, however, seek to require Ms. KT to divulge her mother's contact information or any other particular matter, nor did it indicate any particular topics the Defense wished to ask Ms. KT about in the interview.

With respect to the production of Ms. KT's mother, trial defense counsel asked to call Ms. KT to testify on the motion so that they could ask her about the substance of her phone call with her mother. Trial defense counsel did not, however, specifically indicate what information they intended to elicit from Ms. KT, much less whether they wished to ask her for the contact information while she was on the stand. The military judge declined to receive evidence on the motion, short-circuiting the Defense's effort to question Ms. KT at all, so we can only speculate about what specific questions trial defense counsel might have wanted to ask Ms. KT. The military judge did, however, expressly state the Defense would be permitted to cross-examine **[*82]** Ms. KT during the findings portion of the trial about the fact she did not want her mother to be interviewed by the Defense.

At the close of the Government's case—when the Defense asked the military judge to either strike Ms. KT's testimony or dismiss the sexual assault specification pertaining to Ms. KT—the Defense did not argue that Ms. KT had refused to answer any particular question or that the military judge should have compelled her to provide any information. Instead, the Defense's arguments were: (1) that the Government failed to disclose that Ms. KT lied to Appellant when she told him via text that she was talking to her mother, when in fact she was talking to a friend; and (2) that Ms. KT's refusal to be interviewed resulted in a "trial by ambush."

We are somewhat stymied by Appellant's claim that the military judge abused his discretion by not compelling Ms. KT to "answer relevant questions," because she never refused to answer any questions, and the

Defense never asked the military judge to compel her to do so. During oral arguments in this case, Appellant asserted his claim of Ms. KT not being compelled to answer relevant questions should be read as an allegation the military **[*83]** judge erred by not allowing the Defense to call Ms. KT to the stand for the purposes of the motion.

Had the military judge simply permitted the Defense to present evidence on this motion by way of Ms. KT's testimony, we would actually know what questions Ms. KT did or did not answer, and we would have clearer understanding of the relevance of Ms. KT's mother's testimony. Instead, the military judge decided the motion based upon the proffers of counsel, even though the better practice is to permit counsel to call witnesses and present actual evidence. *See, e.g.,* United States v. Stubbs, 23 M.J. 188, 195 (C.M.A. 1987). Nevertheless, it is not necessarily an abuse of discretion to accept undisputed representations of counsel for purposes of deciding motions. *See, e.g.,* United States v. Vanderwier, 25 M.J. 263, 266 n.3 (C.M.A. 1987). In the end, the only indication we have as to what exactly trial defense counsel wished to ask Ms. KT about—besides her declining to interview with the Defense—is trial defense counsel's ambiguous statement that they "have an issue" regarding "evidence in conversation with her mother happens [sic] both very approximate [sic] in time to the charged event." This statement is far too vague for us to determine what questions the Defense wanted to put to Ms. KT, and we see no basis **[*84]** for concluding the military judge abused his discretion by denying the Defense the ability to call her as a witness on the motion.

b. Ms. KT's Refusal to Submit to Pretrial Interview

At trial and on appeal, Appellant has correctly conceded Ms. KT was under no obligation to submit to a pretrial interview. *See* United States v. Morris, 24 M.J. 93, 95 (C.M.A. 1987). Similarly, in the absence of evidence that trial counsel was involved in Ms. KT's refusal to be interviewed by the Defense, there is no basis for finding an Article 46, UCMJ, violation. *Id.*; *see also* United States v. Killebrew, 9 M.J. 154, 160 (C.M.A. 1980) (citations omitted) (noting that a witness may refuse to answer defense questions as long as the Government did not induce the refusal). "No *party* may unreasonably impede the access of another party to a witness or evidence." R.C.M. 701(e) (emphasis added). However, Ms. KT was a not a "party." *See* R.C.M. 103(17) (defining "party" as the accused, defense counsel, trial counsel, and agents acting on their behalf).[27] We reach the same conclusion regarding her special victims' counsel who represented not the Government, but Ms. KT herself. And given that Appellant has not alleged—and there is no evidence to support—that the Government possessed and failed to turn over the information Appellant sought, there has been no *Brady* violation. **[*85]**

c. Ms. KT's Withholding of Her Mother's Contact Information

As a result of the foregoing, we are left with a situation in which Ms. KT, a civilian victim, sought to prevent the Defense's access to a witness—her mother. Because the Defense did not seek to compel Ms. KT to provide her mother's contact information, the question becomes whether the military judge erred by not *sua sponte* compelling Ms. KT to disclose it. We conclude he did not. ***HN17***[⬆] While military judges are not potted plants, they must remain impartial, and we see no error—plain or otherwise—in a military judge refraining from seeking discovery for one party's benefit when that party has not requested the military judge's help in securing it in the first place.

d. Denial of the Defense's Motion to Produce Ms. KT's Mother

In spite of Appellant framing this issue as one in which Ms. KT should have been compelled to provide her mother's contact information, the more pertinent question seems to be whether the military judge erred in not ordering production of Ms. KT's mother for trial pursuant to the Defense's motion. We asked the parties to provide oral argument on this point.

We conclude that the military judge's ruling was erroneous **[*86]** insofar as he determined Ms. KT's mother was unavailable under Mil. R. Evid. 804(a). ***HN18***[⬆] Under that rule, a witness is "unavailable" when she either refuses to testify about the subject matter *despite an order from the military judge to do so*; or when she is absent and her presence cannot be

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[27] Appellant asks us to consider Ms. KT to be a party or a "quasi-party" based upon the fact crime victims have been afforded certain rights with respect to courts-martial. Appellant cites no authority for this proposition, and we are aware of none. We decline to extend the definition of "party" beyond that found in R.C.M. 103(17).

procured *by process or other reasonable means*. In this case, the military judge never ordered Ms. KT's mother to testify, nor did he direct the Government to explore any means at all to secure her presence. Despite having the ready ability to require trial counsel to seek Ms. KT's mother's presence at trial, the military judge simply found that Ms. KT's mother was unavailable without providing any explanation for how he reached that conclusion. Ms. KT's desire that her mother not testify is inadequate to establish her mother's actual unavailability; even if Ms. KT's mother was reluctant to testify—which, of course, there is no direct evidence so indicating—the standard for unavailability would be that she *refused* to testify after being ordered to do so, she was not amenable to process, or her presence could not be procured by other reasonable means.

Because the military judge erred in finding Ms. KT's mother "unavailable," **[*87]** he thereby applied the wrong standard for deciding whether to order her production. Under R.C.M. 703(b)(1), Appellant had the right to the production of any witness whose testimony on a matter in issue would be relevant and necessary. Once a witness was deemed unavailable, however, Appellant was only entitled to relief upon meeting the heightened standard of demonstrating the witness's testimony was "of such central importance to an issue that it [was] essential to a fair trial." The military judge determined Appellant had not met this higher standard and was, therefore, entitled to no relief. By incorrectly finding Ms. KT's mother unavailable, the military judge applied the wrong standard to analyzing the question of whether he should order Ms. KT's mother's production. That is, instead of correctly deciding Appellant's motion to order the production of Ms. KT's mother, the military judge erroneously analyzed whether Appellant was entitled to relief based upon Ms. KT's mother's purported unavailability.

In employing the incorrect standard regarding a witness who had not actually been shown to be "unavailable," the military judge abused his discretion insofar as his analysis was predicated on an erroneous **[*88]** view of the law. This does not end our inquiry, as we next ask whether Appellant was entitled to Ms. KT's mother's production. Answering that question is difficult, as the military judge hobbled the Defense's attempt to demonstrate the relevancy of her testimony when he declined to permit the Defense to call Ms. KT to testify about her conversation with her mother. Instead, the military judge largely decided the production motion not upon evidence, but upon the proffers of counsel—proffers which were vague in light of the fact the Defense had never been able to talk to either Ms. KT or—because of Ms. KT's efforts—Ms. KT's mother.

For the purposes of this appeal, we will assume, without deciding, that Ms. KT's mother's testimony would have been relevant and necessary on the merits, and Appellant was therefore entitled to have her produced. As a result, the issue becomes whether the military judge's denial of her production was harmless beyond a reasonable doubt. We conclude that it was. Whatever Ms. KT's mother might have said about influencing her daughter with regards to Ms. KT's report of sexual assault, Appellant's text messages largely corroborate Ms. KT's testimony that Appellant **[*89]** in fact assaulted her. In those messages, Appellant said he "got carried away," that he was "so sorry for what happened," that he "regret[ted] everything," and that it was "the biggest mistake [he had] ever made." Two days later, he texted Ms. KT saying he had had time to think about "what [he] did," that he "regret[s] it so much," that he would "never do that again," and that he "respect[s her] boundaries." He wrote: "I wish it never happened. I wish I would have never did that." Any ambiguity in those texts is removed by other texts in which Appellant responds to a question from Ms. KT asking him why he did "that"—he replied, "I think that in that moment I wanted to have sex with you again. And when it was happening it felt really good;" "I wasn't listening in that point of time and I was being selfish as to how you felt. I should have stopped and listened to you;" and, "It's your body and you have the right to say no."

Based upon Ms. KT's testimony about the assault and Appellant's own words in the following days, we conclude the denial of Ms. KT's mother's production was harmless beyond a reasonable doubt. *See* *United States v. Hall, 58 M.J. 90, 94-95 (C.A.A.F. 2003)*.

C. Reconsideration of the Mil. R. Evid. 412 Ruling

As discussed above in Section II.A.1.c., **[*90]** *supra*, the military judge *sua sponte* reconsidered his ruling under Mil. R. Evid. 412 regarding Appellant's and Ms. KT's relationship in the midst of the Defense's opening statement. Appellant asserts this reconsideration was erroneous, and he argues that he was prejudiced by the reconsideration insofar as it occurred while trial defense counsel was delivering the Defense's opening statement, thereby "disturbing the flow of information and impact" of that presentation. Appellant theorizes that "[t]he members were more than likely left wondering

what had happened and what the Defense did wrong" to result in trial counsel's objection and the ensuing 30-minute delay—in part because the military judge did not explain anything to them about trial counsel's objection or the delay when they returned to the courtroom. The Government contends this is "pure speculation" and that the military judge's as-reconsidered ruling was more appropriate than his original ruling. We note that trial defense counsel neither requested any particular instruction nor sought any other relief as a result of the ruling's reconsideration.

Appellant does not argue that the military judge's reconsidered ruling on the Mil. R. Evid. 412 motion was incorrect. **[*91]** Instead, he argues the military judge erred in deciding to reconsider the original ruling.

1. Law

HN19[↑] Under R.C.M. 905(f), the military judge may reconsider any ruling—other than one amounting to a finding of not guilty—either upon the request of a party or *sua sponte*. Military judges must be sensitive to the possibility that reconsidering an earlier ruling favorable to the defense may unduly prejudice an accused or otherwise raise the question of whether a mistrial is appropriate. *See* *United States v. Cofield, 11 M.J. 422, 431 n.14 (C.M.A. 1981)*. We review a military judge's decision to reconsider a ruling for abuse of discretion. *See, e.g.,* *United States v. Newhouse, No. ACM 38019 (recon), 2014 CCA LEXIS 660, at *10 (A.F. Ct. Crim. App. 4 Sep. 2014)* (unpub. op.) ("The fact that a ruling upon reconsideration differs from an initial ruling does not necessarily compel a finding that either was an abuse of discretion.").

2. Analysis

Although the military judge's handling of this matter left a great deal to be desired, he had the inherent authority to reconsider his original ruling at any point during Appellant's court-martial. Because Appellant does not argue the military judge's as-reconsidered ruling on the Mil. R. Evid. 412 issue was erroneous, our focus is on whether the military judge abused his discretion in electing to reconsider the motion or whether he unfairly prejudiced Appellant **[*92]** in doing so. We conclude he did neither.

At the point of trial counsel's objection, trial defense counsel had just told the members that Appellant and Ms. KT had "consensual sex on multiple occasions the first week." The military judge's written ruling originally permitted the parties to elicit evidence as to a specific number of times Appellant and Ms. KT engaged in sexual intercourse, but his reconsidered ruling barred any evidence "regarding frequency." Because trial defense counsel did not actually comment on the specific number of instances of sex prior to the objection, the military judge's reconsidered ruling did not create the situation wherein the Defense promised to present evidence of a fact they would no longer be permitted to prove. Instead, the Defense's case was prospectively limited to a degree, although Appellant does not argue that his defense was prejudiced in any substantive way by the new ruling. Thus, we do not see any indication Appellant's presentation of his overall case was impacted by the substance of the reconsidered ruling, and we perceive no unfair prejudice from there being a reconsideration at all. That conclusion is further bolstered by the fact that **[*93]** the military judge never told the members that he had, in fact, sustained the Government's objection to the "multiple occasions" comment, which meant the members were never told to disregard or otherwise minimize trial defense counsel's comment.

We agree that the extended break during the Defense's opening statement likely left the members wondering what was going on, but that is generally true of all *Article 39(a), UCMJ*, sessions during which members are directed to leave the courtroom. As is typically done, the military judge in this case told the members in his initial instructions that there would be hearings outside of their presence, and he asked for their patience and understanding when those hearings occurred. This tells us the members were generally aware they would be asked to leave to the courtroom on occasion in order for the military judge to resolve matters. Appellant has provided no evidence the members drew any conclusion adverse to his case based on this particular session, and we will not infer they did, especially in light of the fact that not only did this occur very early in the trial, but the military judge never informed the members he had ruled adversely to the Defense. Plainly, **[*94]** a better approach would have to been to accurately establish the parameters of the allowable evidence prior to opening statements so that the parties had a degree of clarity on how to frame their respective cases, but we see no unfair prejudice to Appellant under the facts presented here. Thus, Appellant is entitled to no relief on this ground.

D. Military Judge's Instructions on Attempted Sexual Assault

On appeal, Appellant argues the military judge erred when he declined the Defense's request to specify in his instructions to the members which overt acts the Government needed to prove in order to establish Appellant had attempted to sexually assault Ms. ES as alleged in the Specification of Charge II. Although we disagree with Appellant's argument as he frames it, we conclude the military judge's instructions were incorrect and that Appellant's conviction on this specification cannot stand.

1. Additional Background

In July 2018, Ms. ES and Appellant had been together about five years and married for the last two of those years. The marriage, however, was not going well, and the two had talked about divorcing. Ms. ES was also making arrangements to fly to her parents' home in California **[*95]** with no immediate plans to return to the house she shared with Appellant in Washington.

Although Ms. ES could not remember the exact date, she testified that one night in July 2018 she was laying on the couch when Appellant came home at the end of his typical mid shift—a shift which she said ended at 2200 hours.[28] According to her testimony, Appellant took off his uniform jacket and hat and then walked over to her, got down on his knees in front of the couch so that his waist was "probably on level with the couch," and tried to kiss her despite her saying "no." She testified, "And he kept trying to kiss me and he was touching me and I was telling him to stop." She said Appellant then "grabbed [her] arms and held them together with one of his hands" while he "was touching [her] all over" as she was "asking him to stop." Ms. ES said she was "struggling" with Appellant, but he was able to "move[her] leg open so that he can get in between [her] legs," while still touching and trying to kiss her. During the struggle, Ms. ES said she could feel Appellant's erect penis on her vagina through their respective clothing. Ms. ES kept telling Appellant to stop, at which point Appellant "grabbed both **[*96]** of [her] arms" and said, "[N]o, you stop," and then "shook" her, finally "[throwing her] leg to the side." Ms. ES testified Appellant "shuffle[d] back on his knees . . . to get out." She "closed [her] legs," and then Appellant said, "[Y]ou're my wife so I can take it if I want to." A photograph of a bruise on Ms. ES's right forearm was admitted as evidence of an injury she sustained during the struggle.

A few days after the assault, Ms. ES called her brother, Mr. AK, and told him what had occurred. Mr. AK then called Appellant to hear his version of events. Mr. AK testified that during that call, Appellant admitted grabbing Ms. ES's wrists, holding her down and trying to kiss her and said that "[h]e wanted to have sex with his wife to see if there's anything still there emotionally."

Based on these events, Appellant was charged with committing abusive sexual contact on Ms. ES by touching her vulva with his penis through their clothing with an intent to gratify his sexual desire, without her consent, and by causing her bodily harm by so touching her. He was also charged with attempting to sexually assault her with a specification which alleged Appellant "did . . . attempt to commit a **[*97]** sexual act upon [Ms. ES], to wit: penetrating her vulva with his penis, by causing bodily harm to her, to wit: penetrating her vulva with his penis, without her consent."

Appellant was acquitted of the former and convicted of the latter. As discussed in Section II.A.1.a., *supra*, the Defense unsuccessfully sought the pretrial dismissal of the attempted sexual assault specification under the theory that it did not provide Appellant with adequate notice of how he was being accused of attempting to commit the offense. Essentially, the Defense argued the Government had failed to allege in the specification what particular act Appellant had taken in furtherance of the attempt.

Once the Government rested, the Defense moved the military judge to enter a finding of not guilty for the attempted sexual assault specification. In this mid-trial motion, trial defense counsel argued the evidence was insufficient to show Appellant had taken a substantial step towards committing sexual assault, which had been charged as Appellant penetrating Ms. ES's vulva with his penis and causing her bodily harm by doing the same without her consent. The Defense's first argument was that—even accepting Ms. ES's testimony **[*98]** that Appellant had held her arms and kissed her—such conduct did not amount to a substantial step towards committing the charged conduct of attempting to penetrate Ms. ES's vulva with his penis, especially in light of the fact both Ms. ES and Appellant were fully clothed. The Defense's second argument was rooted in

[28] One of Appellant's co-workers, as well as his roommate, who was the shift lead, testified the mid shift ended at 2300 hours, not 2200.

the notion that Appellant never intended to sexually assault Ms. ES because he did not try to penetrate her vulva with his penis, and not because he was thwarted by "unexpected intervening circumstances." The Defense's hypothesis seemed to be that the most Appellant intended to do was touch Ms. ES with his penis, through their respective clothing.

The military judge denied the Defense's motion, finding that Ms. ES's testimony established that Appellant "initiated contact by getting on top of her, forcing her legs apart, kissing her, holding her wrist, touching her body, and trying to remove her clothing."[29] He concluded this was "at least some evidence that would amount to more than mere preparation . . . and could be considered a substantial step towards the commission of the offense of sexual assault." The military judge further noted Appellant's statement that he could "take **[*99]** it," along with his comments to Ms. ES's brother, indicated Appellant's desire to engage in "sexual activity" with Ms. ES. Finally, the military judge found that Ms. ES's resistance to Appellant's advances was "at least some evidence of an intervening cause or circumstance that would prevent completion of the offense."

Although the specification did not allege a particular act committed by Appellant in furtherance of his attempt, the military judge proposed to instruct the members:

> In order to find the Accused guilty of this offense you must be convinced by legal and competent evidence beyond a reasonable doubt, 1) That at or near Spokane, Washington, on or about 18 July 2018, the Accused did a certain act, that is: attempt to commit a sexual act upon [Ms. ES], to wit penetrating her vulva with his penis, by causing bodily harm to her, to wit: penetrating her vulva with his penis without her consent; 2) That the act was done with specific intent to commit the offense of sexual assault; 3) That the act amounted to more than mere preparation, that is, it was a substantial step and a direct movement toward the commission of the intended offense; 4) That such act apparently tended to bring **[*100]** about the commission of the offense of sexual assault, that is the act apparently would have resulted in the actual commission of the offense of sexual assault except for an unexpected intervening circumstance which prevented completion of that offense.

In defining preparation, the military judge proposed:

> To find the Accused guilty of this offense you must find beyond a reasonable doubt that the Accused went beyond preparatory steps and his acts amounted to [a] substantial step [and] a direct movement toward the commission of the intended offense. A "substantial step" is one that is strongly corroborative of the Accused['s] criminal intent and is indicative of his resolve to commit the offense. Proof that the offense of sexual assault actually occurred or was completed by the Accused is not required, however it must be proved beyond a reasonable doubt that at the time of the acts the Accused intended every element of sexual assault.

Trial defense counsel objected to the proposed instructions because they did not specify what the "certain acts" were that Appellant allegedly committed which tended to bring about the commission of the offense of sexual assault. Trial defense counsel further **[*101]** pointed to the instruction in the *Military Judge's Benchbook*[30] that calls for specifying such acts for the members. In the *Benchbook*, the model instruction employs the following template for an attempted offense:

> (1) That . . . the accused did (a) certain act(s), *that is: (state the act(s) alleged or raised by the evidence)*; (2) That the act(s) (was) (were) done with the specific intent to commit the offense of (state the alleged attempted offense); (3) That the act(s) amounted to more than mere preparation, that is, (it was) (they were) a substantial step and a direct movement toward the commission of the intended offense; and (4) That such act(s) apparently tended to bring about the commission of the offense of (state the alleged attempted offense), (that is, the act(s) apparently would have resulted in the actual commission of the offense of (state the alleged attempted offense) except for (a circumstance unknown to the accused) (an unexpected intervening circumstance) (__) which prevented completion of that offense).

Department of the Army Pamphlet 27-9 at 177, *Military Judges' Benchbook* (10 Sep. 2014) (*Benchbook*) (emphasis added).

The Government **[*102]** opposed identifying any specific acts which might amount to a substantial step in

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[29] Ms. ES never testified that Appellant either got on top of her or tried to remove her clothing during the episode.

[30] Department of the Army Pamphlet 27-9, *Military Judges' Benchbook* (10 Sep. 2014) (*Benchbook*).

the instructions. The military judge said the Defense's objection was "definitely noted," but that he would not modify his proposed instructions. He explained:

> It is for the members to determine after considering all the evidence, whether or not the acts that constitute the attempted offense[,] i.e.[,] the substantial step toward the movement of that offense. Whether or not those acts actually meet that element or not is for them to decide and for the [c]ourt to essentially sit down and plug in all of the evidence that may have come out during the trial that the [c]ourt anticipates the Government may argue constitutes evidence of a substantial step. I think would be[,] number one would be somewhat improper for the [c]ourt to plug that in there because of the suggestion that the [c]ourt[']s dictating to the members the scope of the evidence that they can consider[a]s evidence amounting to a substantial step, but again I do not want to intrude on their ability to decide on their own based on the evidence presented and how [c]ounsel characterize and argue that evidence[, w]hat actually constitutes more than **[*103]** a mere preparation or substantial step.
>
> And so therefore, and based on samples and examples that I have reviewed in the past. [sic] While there may be a circumstance depending on the type of offense charged where it is drafted differently in this particular offense. [sic] I am comfortable plugging in the attempt, the actual nature of the offense that has been attempted. And then leave it to the parties to characterize with regard to elements two and three, excuse me three really, three and four, whether or not the evidence presented meets those elements.

The military judge gave the members the instructions as he had originally proposed. In the Government's closing argument, trial counsel argued, "You either believe that the Accused did a certain number of acts, kissing, and touching, and all that right, a substantial step toward having sex with Ms. [ES] or you do not. I do not know how much more I can say about it."

When the members returned their verdict acquitting Appellant of abusive sexual contact, but convicting him of attempted sexual assault, trial defense counsel moved the military judge to declare a mistrial, explaining that their

> principal concern permeating all of this is that **[*104]** there were no specific acts pled in the Specification of Charge II. . . . [T]here was never any specific articulation in the pleading or otherwise that put [Appellant] on notice of the exact things that he would have done to contemplate or actually complete the attempt.

In addition to asserting Appellant was prejudiced by a lack of notice and that the members' findings were inconsistent, trial defense counsel said the military judge's instruction "caused confusion in such a way and did not properly guide the members on making findings of specific acts." In discussing the matter with counsel, the military judge said,

> The act and I know it sounds inconsistent but I didn't see anything—any legal authority to say otherwise. The act is actually the effort to penetrate the vagina with the penis. That's the act. Whether or not he noticed [sic] substantial step towards completing that act, tried to take off clothes, kissed, held arms, et cetera, those are—that's all facts and circumstances that the members are free to consider when deciding whether or not there was a substantial step towards completion of the act. There is no requirement and we've been over this in the failure to state an offense **[*105]** motion. There is no requirement for the [G]overnment to plead all of that information . . . .

In their written motion for a mistrial, trial defense counsel argued that the military judge's failure to specify particular acts raised by the evidence in his instructions amounted to "an abdication of the judicial role in a members findings case," because doing so "essentially nullified the members having to find anything" with respect to the first element of the offense. In his ruling, the military judge indicated he relied upon *United States v. Payne, 73 M.J. 19 (C.A.A.F. 2014)*, to assess the sufficiency of his instructions to the members on the attempt charge, asserting the military judge in that case had instructed the members on the first element "identically" to how he had.[31] He also concluded that—because the Government was not required to allege the specific overt acts it intended to prove in order to establish an attempt charge—the Defense had not

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[31] Contrary to the military judge's statement, the military judge in *Payne* did instruct the members regarding what the "overt act" was in that case, as the overt act was charged in the pertinent specification. *73 M.J. at 24*. The United States Court of Appeals for the Armed Forces concluded other aspects of the military judge's instructions on the attempt specification in *Payne* amounted to plain error. *Id. at 25*.

shown that a mistrial was "manifestly necessary in the interests of justice."

2. Law

HN20[] In charging an attempted offense under the UCMJ, it is not necessary to allege the overt act or the elements of the underlying predicate, or target, offense, as long as the accused is adequately on notice **[*106]** of the nature of the offense. *United States v. Norwood, 71 M.J. 204, 206-07 (C.A.A.F. 2012)* (citations omitted).

HN21[] Military judges have a duty to provide instructions which deliver "an accurate, complete, and intelligible statement of the law." *Behenna, 71 M.J. at 232* (citations omitted). Instructions must be "clear and correctly conveyed." *United States v. Medina*, 69 M.J. 462, 465 (C.A.A.F. 2011). We review instructions given "to determine if they sufficiently cover the issues in the case and focus on the facts presented by the evidence." *United States v. McDonald, 57 M.J. 18, 20 (C.A.A.F. 2002)* (quoting *United States v. Maxwell, 45 M.J. 406, 424 (C.A.A.F. 1996)*). "Whether a panel was properly instructed is a question of law reviewed de novo." *United States v. Hale, 78 M.J. 268, 274 (C.A.A.F. 2019)* (quoting *United States v. Medina*, 69 M.J. 462, 465 (C.A.A.F. 2011)). Military judges are required to instruct members on the elements of charged offenses. R.C.M. 920(e)(1).

Instructional errors with constitutional dimensions are tested for prejudice against the standard of "harmless beyond a reasonable doubt." *United States v. Upshaw, 81 M.J. 71, 74 (C.A.A.F. 2021)* (citation omitted). "This standard is met 'where a court is confident that there was no reasonable possibility that the error might have contributed to the conviction.'" *Id.* (citing *United States v. Prasad, 80 M.J. 23, 29 (C.A.A.F. 2020)* (quoting *United States v. Tovarchavez, 78 M.J. 458, 460 (C.A.A.F. 2019)*)).

3. Analysis

On appeal, Appellant concedes the Government was not required to allege any particular overt acts in its charging document, but he argues it was error for the military judge to not list any overt acts in his instructions. Appellant largely points to the *Benchbook* ***[*107]*** guidance that the military judge should specify the overt acts for the members to consider. The Government responds that the *Benchbook* is merely guidance, and it was within the military judge's discretion whether to identify such facts for the members. The Government also notes that neither of the parties at trial proposed any specific overt acts for the military judge to incorporate into his instruction.[32]

We agree the military judge deviated from the model instruction in the *Benchbook* by not identifying any particular "certain acts" that the Appellant did with the specific intent to commit the offense of sexual assault, but Appellant cites to no authority requiring the military judge to specify these acts for the members in his instructions, and we are aware of none. ***HN22***[] The *Benchbook* may provide useful guidance to military judges, but military judges are not required to follow it. *See, e.g., United States v. Simpson, 58 M.J. 368, 378 (C.A.A.F. 2003)* (noting military judges are "not required to follow literally the non-binding examples" in the *Benchbook*). The fact the Government is not required to allege any specific act in its charging instrument somewhat undercuts Appellant's argument that the military judge was required to identify such acts **[*108]** for the members. ***HN23***[] The members, however, were required to find that Appellant did do a certain act; that the act was done with the specific intent to commit an offense under the UCMJ; that the act amounted to more than mere preparation; and that the act tended to effect the commission of the intended offense. 2016 *MCM*, pt. IV, ¶ 4.b.

The flaw here is that—contrary to what he said to the parties at the time—the military judge *did* instruct the members what "certain act" they had to find. He told them they had to be convinced Appellant did the certain act of "attempt[ing] to commit a sexual act upon [Ms. ES], to wit penetrating her vulva with his penis, by causing bodily harm to her, to wit: penetrating her vulva with his penis without her consent." He further told them that in order to find Appellant guilty, they must be convinced beyond a reasonable doubt that this act "apparently tended to bring about the commission of the offense of sexual assault." Thus, the "certain act" identified by the military judge in the first element was the same as the "target" offense of sexual assault in the

[32] Considering the Defense had protested both in pretrial motions and throughout the duration of Appellant's court-martial that the Government had failed to explain what overt acts were being offered to prove the attempted sexual assault offense, it is not particularly noteworthy that the Defense did not volunteer to fill that perceived void for the Government.

fourth element.[33] As a result, the military told the members they had to conclude Appellant committed **[*109]** the act of attempting to sexually assault Ms. ES, and that this attempted sexual assault tended to bring about the commission of the offense of sexual assault. In sum, the instructions set up the paradox of Appellant being convicted of attempting to sexually assault Ms. ES based upon Appellant taking the substantial step of attempting to sexually assault her.

Although the military judge was not obligated to identify in his instructions any particular overt act committed by Appellant in furtherance of the attempt, his decision to do so required him to give an instruction which amounted to "an accurate, complete, and intelligible statement of the law." *Behenna, 71 M.J. at 232*. Here, the military judge's instruction called for entirely circular reasoning, instructing the members to determine whether Appellant attempted to sexually assault Ms. ES when he carried out the act of attempting to sexually assault her. Moreover, in light of the requirement to prove Appellant specifically intended to sexually assault Ms. ES in the manner charged, it is entirely unclear how the members could follow the military judge's instruction that they had to be convinced that Appellant attempted to sexually assault Ms. ES with the **[*110]** specific intent to commit sexual assault in the exact same manner he attempted to do so, and that the attempted sexual assault was a substantial step towards committing the same sexual assault. Compounding this issue, by defining the "certain act" as the charged offense, the military judge effectively relieved the members of their obligation to identify a certain act committed by Appellant in furtherance of his alleged intentional attempt to sexually assault Ms. ES—essentially reading an element entirely out of the offense.[34]

Finding error, we are confronted with the question of whether the error was harmless beyond a reasonable doubt. We conclude it was not. Unlike the situation in which a military judge omits an element which is fairly encompassed by the remainder of the instructions, the military judge here directed the members to an incorrect evidentiary burden. In instructing on the first element, the military judge identified the "certain act"—the predicate act for the attempt offense—as the ultimate offense. Significantly, each of the remaining three elements, as instructed by the military judge, related back to that certain act which the military judge had explicitly identified. **[*111]** For example, for the third element, the military judge told the members they must be convinced that the "certain act" amounted to a substantial step towards the commission of the intended offense. Because the intended offense was the same as the "certain act" under these instructions, the members were faced with either a tautology or an impossibility in evaluating this element. ***HN25***[⬆] That is the case because a preparatory step is, by definition, an intermediate point along a path that terminates at the ultimate destination of the intended offense. Yet the members here were told the preparatory step was the same as the intended offense, entirely eliminating the notion of a preparatory step. The same is true of the second element, in which the certain act must be accomplished with the specific intent to commit the intended offense, as well as the fourth element, in which the same certain act must tend to bring about the intended offense.

The Government asserts that the evidence against Appellant was overwhelming in support of its argument that we should find any instructional error harmless. We are not so convinced. The evidence was strong in terms of proving Appellant struggled with Ms. ES **[*112]** while she lay on the couch, but evidence that Appellant specifically intended to penetrate her vulva *without her consent* is far from conclusive. We are also mindful of the fact the members acquitted Appellant of committing abusive sexual contact during this episode. In any event, we presume the members followed—or at least attempted to follow—the military judge's instructions. *See United States v. Taylor, 53 M.J. 195, 198 (C.A.A.F. 2000)*. In doing so, if the members concluded Appellant committed the "certain act" of attempting to sexually assault Ms. ES, as the military judge explained was required for the first element, then the remainder of the elements would simply fall by the wayside as a result of their own internally circular reasoning. This would pave the way for a finding of guilty without careful analysis of each element.

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[33] The military judge himself appeared to acknowledge that he had instructed as such. When discussing the Defense motion for a mistrial, the military judge stated: "The act and I know it sounds inconsistent but I didn't see anything—any legal authority to say otherwise. The act is actually the effort to penetrate the vagina with the penis. That's the act."

[34] To be clear, we do not hold military judges are required to identify particular overt acts in their instructions in every court-martial involving an offense alleged as an attempt. ***HN24***[⬆] Rather, we hold that when a military judge elects to do so, he or she must ensure those instructions amount to an accurate, complete, and intelligible statement of law.

We conclude the military judge's instructions amounted to an erroneous statement of the law, and because we are not privy to what the members made of the instructions, we cannot be confident their verdict was not a product of this error. Therefore, we cannot find the error harmless beyond a reasonable doubt. We will accordingly we will set aside Appellant's conviction on this specification and set aside his sentence. **[*113]** [35]

E. Completeness of the Record of Trial

Appellant argues his record of trial is defective and incomplete based on a variety of alleged deficiencies discussed in greater detail below.

1. Additional Background

The court reporter detailed to Appellant's court-martial was removed from his court-reporter duties a few weeks after Appellant was sentenced. Presumably due to the court reporter's absence, the military judge certified the record of trial on 20 November 2019. On 7 January 2020, trial counsel certified the transcript stating he had reviewed the transcript in its entirety and that he determined "it is an accurate reflection of the proceeding of the court." The memorandum also notes what software the originally detailed court reporter had used.

2. Law

HN26[↑] Whether a record of trial is complete is a question of law we review de novo. *United States v. Henry, 53 M.J. 108, 110 (C.A.A.F. 2000)*.

Appellant's charges were referred to a general court-martial on 12 April 2019, which is after the 1 January 2019 effective date of the Military Justice Act of 2016. *See* Executive Order 13,825, § 5. This act, *inter alia*, made substantial changes to the post-trial processing of courts-martial. Prior to 2019, a verbatim transcript would be prepared in any case with a sentence including either **[*114]** a punitive discharge or at least 12 months of confinement, and a record of trial was incomplete without such a transcript. R.C.M. 1103(b)(2)(B), 1103(b)(2)(D) (2016 *MCM*). In the event a verbatim transcript could not be prepared due to loss of recordings or notes or for some other reason, a convening authority had the option of either ordering a rehearing or only approving a sentence which included neither a punitive discharge nor more than six months of confinement. R.C.M. 1103(f) (2016 *MCM*). Once the record—to include the transcript—was prepared, the military judge would authenticate the record prior to its service on the accused and transmission to the convening authority. R.C.M. 1104 (2016 *MCM*).

HN27[↑] Under the rules which went into effect 1 January 2019, the contents of a record of trial initially compiled at the conclusion of a court-martial no longer include a transcript of the proceedings—instead, a "substantially verbatim *recording*" of the proceedings is called for, R.C.M. 1112(b)(1) (emphasis added), a copy of which the accused is entitled to, R.C.M. 1106(c). In addition to the recording, a complete record of trial includes such matters as the charge sheet, exhibits, the statement of trial results, and the judgment entered by the military judge. R.C.M. 1112(b), 1112(d)(2). The court reporter **[*115]** certifies the contents of the record of trial, but the military judge may certify the record if the court reporter is unable to do so. *Art. 54(a), UCMJ, 10 U.S.C. § 854(a)*; R.C.M. 1112(c). If the record is found to be incomplete or defective prior to certification, the matter may be raised to the military judge for correction; after certification, the record may be returned to the military judge for correction. R.C.M. 1112(d)(2). Once the record of trial is certified, a copy is provided to the accused; however, sealed exhibits and recordings of closed sessions are omitted. *Art. 54(d), UCMJ*; R.C.M. 1112(e).

HN28[↑] Under the rules now in effect, a certified verbatim transcript of a record of trial shall be prepared in any court-martial in which a punitive discharge or confinement for more than six months is adjudged. R.C.M. 1114(a)(1). The transcript is attached to the record of trial. R.C.M. 1114(d). This transcript, however, is not part of the original record of trial the court reporter certifies—instead, the transcript is attached to the record before the record is forwarded for appellate review. R.C.M. 1112(f)(1)(8). When such a transcript is

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[35] We recognize that, in at least two other cases reviewed by this court, military judges gave similar instructions on attempt offenses. *See United States v. Brown, No. ACM 39728, 2021 CCA LEXIS 414, at *12 (A.F. Ct. Crim. App. 16 Aug. 2021)* (unpub. op.); *United States v. Little, No. ACM 38338, 2014 CCA LEXIS 689, at *10 (A.F. Ct. Crim. App. 19 Sep. 2014)* (unpub. op.). Neither of those unpublished opinions addressed the propriety of the instructions' identifying the predicate act as the same as the target offense. We note that both cases involved convictions for attempt as a lesser-included offense of a charged offense. For these reasons, those two cases provide little guidance for our resolution of Appellant's case.

prepared, the accused and his or her counsel may be provided a copy upon request. R.C.M. 1114(b), Discussion. A copy of the entire record and attachments, which would include the transcript, "shall be forwarded **[*116]** to a civilian counsel provided by the accused" upon written request of an accused. R.C.M. 1116(b)(1)(B).

Unlike the rules in place prior to 1 January 2019, the current rules have no provision granting sentence relief in the case of a defective record of trial. Moreover, these rules contain no provision regarding the correction of inaccurate or incomplete transcripts.

3. Analysis

Appellant points to a number of purported deficiencies with the record of trial which we will address in turn.

First, Appellant contends the record of trial fails to include a video file which was never marked as an appellate exhibit or reviewed by the military judge. This video is discussed in greater detail below in Section II.F., *infra*. In short, the Defense sought permission in a Mil. R. Evid. 412 hearing to question Ms. KT about the contents of a particular video. Trial defense counsel commented that the military judge did not have a copy of the video, and he asked the military judge: "Does the [c]ourt require that or is the [c]ourt willing to take the proffer[?]" The military judge said he did not need to see the video to rule on the motion and that the video would not be attached to the record as an appellate exhibit. The military judge then **[*117]** denied the Defense's motion.

HN29[↑] A record of trial includes "any evidence or exhibits considered by the court-martial in determining the findings or sentence." R.C.M. 1112(b). Nothing in this rule requires inclusion of items never viewed or considered by a military judge on an interlocutory matter. We are aware of no rule, precedent, or other legal authority requiring the attachment of such items to a record, and Appellant cites none. Appellant's claim on this point is without merit.

Second, Appellant notes there are several comments in the court reporter chronology—included in the record—suggesting "various instances of problems encountered" in the preparation of the record.[36] He highlights four particular entries—two entries indicate trial counsel located missing audio; the third states the audio and the "Log Notes" did not match; and the fourth says two of the days of transcript were reviewed "due to significant amounts of missing transcription." Appellant, who has access to the original audio recording of his trial, does not contend the transcript is inaccurate in any way or that the final transcript omits any portion of the trial. Appellant does not explain the relevance, if any, of the comment about **[*118]** the audio and the notes not matching, and we see nothing in the record illuminating the matter. Even if Appellant were to demonstrate the transcript is inaccurate, the current Rules for Courts-Martial afford him no relief because it is the audio recording that is a component of the certified record of trial; the transcript is a matter attached for appellate review under R.C.M. 1112(f). While we can envision a transcript so inaccurate as to amount to prejudicial error, Appellant has not approached that threshold, and he is not entitled to relief based upon the four comments he identified in the chronology.

Third, although the military judge ordered numerous documents to be sealed during Appellant's court-martial, many were not in fact sealed when the record of trial was assembled. We are aware of this error, as we ordered the documents to be sealed once we discovered them in our review. According to Appellant, he received these documents, unsealed, when he received his record of trial in January 2020. While this was unquestionably an error denoting a lack of diligence in the preparation of the record of trial, Appellant has identified no prejudice he has suffered, and we are aware of none. As **[*119]** such, Appellant is entitled to no relief. Although we grant no relief, we pause to note that it was the military judge who certified this record of trial as being "accurate and complete" on 20 November 2019. The fact that he apparently did not notice the matters he ordered sealed were not actually sealed indicates his review was less than thorough.[37]

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[36] The Government's answer and Appellant's reply brief both reference chronologies which were included in the record of trial docketed with our court. The parties have not taken a position as to whether these chronologies are part of the "record" as defined in R.C.M. 1112(b), "attachments for appellate review" under R.C.M. 1112(f), matters that we may consider because both parties have referenced them in their briefs, without objection, or something we may not consider on appeal under *United States v. Jessie, 79 M.J. 437, 440-41 (C.A.A.F. 2020)*. We assume without deciding that we may consider the chronologies, as neither party objected to them at any point. *See United States v. Stanton, 80 M.J. 415, 417 n.2 (C.A.A.F. 2021)*.

[37] We remind all involved with the preparation and certification

Fourth, Appellant states the second page of the Defense's written motion for a mistrial is missing, having been replaced with an email. The record filed with this court, however, suffers no such infirmity—the second page of the motion in that record is the second page of the Defense's motion. Without objection from Appellant, the Government has provided this court with a certificate of receipt in which Appellant's military appellate defense counsel signed for receipt of "disc(s)" containing three items, one of which was the second page of the motion in question. The receipt is dated 13 April 2021, which was more than a month after Appellant filed his assignments of error. Appellant, however, submitted a reply brief on 27 April 2021 and did not revisit this asserted error, indicating to us a lack of prejudice. Having reviewed the page, we **[*120]** conclude Appellant was not prejudiced, especially since he possessed the transcript of the on-the-record discussion of the matter and the military judge's ruling. Although Appellant's copy of the record should have included the missing page, we are not inclined to find prejudicial error from a single errant page out of a ten-volume record, especially when his counsel had the ready ability to inspect the record filed with this court that included the correct page.

Fifth, Appellant states the first segment of a video file of Ms. KT's law enforcement interview "does not play." In response, the Government notes that in the court-martial transcript, trial defense counsel told the military judge which particular video program to use to play back the recording. The Government also avers it gave Appellant's appellate counsel a new copy of the first segment of the interview on 13 April 2021. As with the missing motion page, Appellant did not readdress or attempt to demonstrate prejudice in his reply brief. We note that the recording in the record of trial docketed with this court was readily viewable using the software trial defense counsel specified at trial. Based upon the matters before us, **[*121]** we are unable to determine if Appellant received a corrupted copy of the video file or if his counsel was utilizing incompatible software when attempting to view it. In any event, Appellant has not demonstrated prejudice to his case, and we will not strain to find any.

Sixth, Appellant alleges his copy of the record "does not contain any of the exhibits that were included in the [record] on disc." He identifies one exhibit in particular: Appellate Exhibit XLII. This exhibit, however, is not an electronic exhibit at all; it is a paper copy of a single page of notes taken from the Air Force Office of Special Investigation's report of investigation concerning Appellant's charged offenses. The only electronic evidence in the record docketed with our court is the video recording of Ms. KT's interview with law enforcement agents, and we know Appellant received that item, as he complained about his inability to play the first segment of it. Appellant identifies no exhibits he has not been provided on a disc or otherwise, and we are aware of none. To the extent Appellant is asserting he received copies of paper exhibits only in an electronic format, we would find no prejudice so long as he **[*122]** received the exhibits in either format.

Seventh, Appellant argues a court reporter was required "to attest to the accuracy and completeness of the record of trial." He submits that trial counsel's certification was insufficient because trial counsel "lacked personal knowledge of the specific equipment and versions of the software used" either by the originally detailed court reporter or the other court reporters involved in the transcription. We note as an initial matter Appellant has failed to demonstrate that trial counsel did not actually know what equipment or software the court reporters used. Appellant bases his argument that a court reporter, and not trial counsel, must certify the transcript, on a provision found in Air Force Manual (AFMAN) 51-203, *Records of Trial* (4 Sep. 2018, as amended by Air Force Guidance Memorandum 2019-01, 9 May 2019).[38] We assume, even though Appellant argues here that a court reporter must certify the record of trial, that he is actually referring to the transcript, as the provision he highlights calls upon the court reporters involved to "certify[ ] the quality, authenticity of the transcript or portion of the transcript, and method used to transcribe **[*123]** the proceeding." AFMAN 51-203, ¶ 14.14. This AFMAN and the related Guidance Memorandum explain they were issued by order of the Secretary of the Air Force, and compliance with both is mandatory. Given that neither document purports to authorize trial counsel to certify a transcript of court-martial proceedings, trial counsel's certification here arguably ran afoul of their

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of records of trial to approach these duties with the careful attention to detail which is warranted by the gravity of military justice proceedings. When matters filed under seal are subsequently released with no protection, the important policy reasons for sealing them are entirely compromised.

[38] This was the version of the manual in effect at the time of Appellant's court-martial. It has since been replaced by Department of the Air Force Manual 51-203, *Records of Trial* (21 Apr. 2021).

requirements. Appellant has identified no prejudice from this error, and we perceive none—especially because Appellant has access to the recording of his court-martial and he has not identified any transcription errors, let alone demonstrated how any such errors might have prejudiced him.

Lastly, Appellant argues that because of the foregoing claimed errors, "the entire record has been called into question," and we should reassesses his sentence "to a level not exceeding that permissible in a trial reported by a non-verbatim transcript." Appellant relies on the rules in place before 1 January 2019 for this proposition, but as explained above, that sentence remedy for a non-verbatim transcript no longer exists. Our reading of the applicable rules is that the audio recording is now the primary record **[*124]** of the proceedings, and the written transcript of those proceedings is created to facilitate appellate review. *HN30*[] A record of trial is complete if it includes the required items listed in R.C.M. 1112(b), and Appellant has not demonstrated any of those items are actually missing, with the exception of a single page of one motion in Appellant's copy of the record of trial—as opposed to the original record which contains no such omission—an error from which Appellant asserts no prejudice, and has, in any event, been remedied. Even if the record was incomplete or defective, the remedy would not be to grant Appellant sentencing relief, but rather, to return the record for correction. Because we *sua sponte* ordered the Government to seal the unsealed matters in the record, the sole remaining defect is the fact the transcript was certified by trial counsel rather than by the court reporters, as required by AFMAN 51-203. Finding no prejudice to Appellant flowing from this shortcoming, we grant no relief. *See* *Article 59(a), UCMJ, 10 U.S.C. § 859(a)*.

F. Military Judge's Ruling on Explicit Videos

Appellant personally raises the claim that the military judge erred in ruling evidence regarding sexually explicit mobile phone videos was inadmissible under Mil. R. Evid. 412.[39]

1. Additional [*125] Background

Prior to trial, the Defense sought permission, via written motion, to admit evidence that Appellant and Ms. KT had recorded their consensual sexual conduct the weekend of the charged assault.[40] The Defense offered four theories for the admissibility of the evidence. First, the Defense argued the fact Appellant and Ms. KT recorded their conduct—taken together with all other consensual conduct between the two—was evidence Ms. KT actually consented to the conduct forming the basis of the alleged assault, or that Appellant was reasonably mistaken as to whether she had consented or not. Second, the Defense postulated that one or more of the videos might be recordings of the alleged assault itself and would be evidence no assault occurred. However, pointing to the Government's denial of the Defense expert computer assistance, trial defense counsel conceded they were unable to specifically determine when the recordings were made. Third, the Defense argued the videos would "serve two crucial impeachment functions" by demonstrating possible motives for Ms. KT to make a false allegation of sexual assault. In essence, the Defense suggested Ms. KT regretted participating in the recordings, **[*126]** and she might have accused Appellant of assaulting her in order to persuade Appellant to dispose of the recordings. The other theory advanced by the Defense was that one of the recordings depicted Ms. KT making a comment which could be interpreted as a desire to have unprotected sex with Appellant. Thus, the theory continued, when Ms. KT later came to regret having had unprotected sex with Appellant, and after she used an emergency contraceptive, she falsely accused him of sexually assaulting her.

Finally, the Defense argued the recordings should be available to Appellant to confront Ms. KT by challenging her credibility with prior inconsistent statements. The Defense asserted that during the investigation, Ms. KT discussed the videos with investigators, and she told them she did not agree to or assist in making the recordings. The Defense further asserted Ms. KT told investigators she took the phone away from Appellant when she realized he was using it to record the two of them. The Defense claimed that one video showed Ms. KT actively participated in the filming and argued that Ms. KT's purportedly untruthful statements to the investigators implicated Appellant's constitutional confrontation **[*127]** rights, insofar as they implicated

[39] This issue was raised during a closed hearing, the transcript of which was sealed by the military judge. We limit our discussion of sealed material to that which is necessary for our analysis.

[40] The parties alternated between referring to multiple videos and referring to just a single video. For purposes of our analysis, we will assume there was more than one video.

Ms. KT's credibility and the overall veracity of her allegations.

In their written motion, trial defense counsel offered conflicting statements about whether they wished to admit the videos themselves into evidence or to simply ask Ms. KT about them. At one point, the motion states, "To be clear . . . the Defense is not seeking to play this tape for members—but rather cross examine [Ms. KT] about its existence, content, and her state of mind when making it." In the very next paragraph, however, the Defense argued the members "would be lost in the dark as to the true nature of the quickly-escalating sexual relationship between [Ms. KT] and [Appellant] if they do not get to observe the actual sex between the two." In the next paragraph, the Defense stated, "at least cross examination about these videos should be permitted," and only "the video of the charged event" should be admitted as substantive evidence or impeachment. When discussing the admissibility of the recording with the military judge, trial defense counsel said, "I apologize if I didn't make that clear. I do not intend to play the video. We are asking for the [c]ourt's permission to be able **[*128]** to ask questions about the video."

Trial counsel objected to any discussion of the videos, arguing in their written response to the Defense's motion that the fact Ms. KT and Appellant may have agreed to record sexual contact had "marginal probative value" but "an exceptionally strong risk of prejudice."[41] The Government did not specifically address the Defense's theories of admissibility of the videos.

During the motions hearing on Friday, 23 August 2019, the military judge expressed skepticism that the Defense should be allowed to impeach Ms. KT with respect to what she told the investigators about the videos. He told trial defense counsel,

> You can't just simply ask someone a question about something that you know they're going to say something about that—that opens the door to be able to bring in extrinsic evidence of the falsity. The purpose about asking about this particular instance in the first place would have to satisfy, at a minimum, the relevancy standards necessary before you can even ask about this. If this is independently irrelevant, you don't necessarily get to talk about it.

The military judge did not view the videos or have them marked as appellate exhibits. Nonetheless, **[*129]** the military judge made findings of fact regarding the contents of one video in his written ruling on the Defense's motion. His description of the video's contents largely tracked the Defense's proffer of what the video depicted, thus indicating Ms. KT may not have been truthful to the investigators. He did not, however, make any findings of fact regarding Ms. KT's statements to the investigators. The military judge ruled evidence about the video was inadmissible under Mil. R. Evid. 412(b)(2) as it did not make it any more or less likely that Appellant had a reasonable mistake of fact as to Ms. KT's consent with respect to the charged assault. The military judge also ruled the evidence was not constitutionally required, but he did not explain his rationale for that conclusion. The military judge did not discuss at all trial defense counsel's desire to impeach Ms. KT with the purportedly false statement she made to the investigators about the recordings. Although the "law" section of the military judge's ruling set out the principles of impeachment by contradiction and an accused's constitutional right to confront witnesses, his "discussion" section did not address these matters with respect to the recordings. **[*130]**

2. Law

HN31[↑] We review a military judge's ruling that excludes evidence under Mil. R. Evid. 412 for an abuse of discretion. *United States v. Erikson, 76 M.J. 231, 234 (C.A.A.F. 2017)* (citation omitted).

HN32[↑] Under Mil. R. Evid. 412, evidence of an alleged victim's sexual predisposition and evidence that an alleged victim engaged in other sexual behavior is generally inadmissible. Mil. R. Evid. 412(a). The intent of the rule is to "shield victims of sexual assaults from the often embarrassing and degrading cross-examination and evidence presentations common to sexual offense prosecutions." *United States v. Ellerbrock, 70 M.J. 314, 318 (C.A.A.F. 2011)* (original alteration, internal quotation marks, and citations omitted). One exception to this rule is when evidence is offered to prove consent. Mil. R. Evid. 412(b)(2). A second exception is when exclusion of the evidence would violate an accused's constitutional rights. Mil. R. Evid. 412(b)(3). In order to show that the exclusion of evidence would violate an accused's constitutional rights, the accused must show that the evidence is

[41] Ms. KT, through her special victims' counsel, objected to admission of the videos, but did not object to being questioned about whether she made inconsistent statements with respect to them.

relevant, material, and favorable to his defense, "and thus whether it is necessary." *United States v. Banker, 60 M.J. 216, 222 (C.A.A.F. 2004)* (internal quotation marks and citation omitted). The term "favorable" means the evidence is "vital." *United States v. Smith, 68 M.J. 445, 448 (C.A.A.F. 2010)* (citations omitted). It is the defense's burden to demonstrate an exception applies. *Banker, 60 M.J. at 223*.

HN33[↑] Evidence which is relevant under Mil. R. Evid. 412(b)(2) may be admissible if the military **[*131]** judge determines the probative value of such evidence outweighs the danger of unfair prejudice to the victim's privacy and otherwise outweighs the dangers of unfair prejudice under a Mil. R. Evid. 403 analysis. Mil. R. Evid. 412(c)(3). Evidence falling under the Mil. R. Evid. 412(b)(3) exception is not weighed against a victim's privacy and is instead only analyzed under Mil. R. Evid. 403. *Id.* Evidence challenging the credibility of key government witnesses may fall under this exception. *See, e.g., United States v. Williams, 37 M.J. 352, 360-61 (C.M.A. 1993)*.

HN34[↑] Under the *Sixth Amendment*, an accused has the right to confront the witnesses against him or her. This right necessarily includes the right to cross-examine those witnesses, which "is the principal means by which the believability of a witness and the truth of his testimony are tested." *Davis v. Alaska, 415 U.S. 308, 316, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974)*. However, judges "retain wide latitude . . . to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness'[s] safety, or interrogation that is repetitive or only marginally relevant." *United States v. Gaddis, 70 M.J. 248, 256 (C.A.A.F. 2011)* (alteration in original) (quoting *Delaware v. Van Arsdall, 475 U.S. 673, 679, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986)*). The test for determining whether an accused's *confrontation clause* rights have been violated is whether a "reasonable jury might have received a significantly different impression of [the witness]'s credibility **[*132]** had [defense counsel] been permitted to pursue his proposed line of cross-examination." *Id.* (alterations in original) (quoting *Van Arsdall, 475 U.S. at 680*).

HN35[↑] Military judges may permit counsel to inquire about specific instances of a witness's conduct on cross-examination if they are probative of the witness's character for truthfulness or untruthfulness. Mil. R. Evid. 608(b). Extrinsic evidence of such is generally inadmissible. *Id.* Military judge's rulings which limit cross-examination under Mil. R. Evid. 608(b) are reviewed for an abuse of discretion. *United States v. Stavely, 33 M.J. 92, 94 (C.M.A. 1991)*. However, when an error at trial is of constitutional dimensions, we assess de novo whether the error was harmless beyond a reasonable doubt. *United States v. Prasad, 80 M.J. 23, 29 (C.A.A.F. 2020)*.

3. Analysis

On appeal, Appellant argues the military judge did "not consider and analyze the facts presented to him regarding [Ms. KT's] claim to [investigators] about the nonconsensual nature of the recording," and therefore abused his discretion. The Government contends that Ms. KT's statement to investigators was more ambiguous than the Defense claims, that the matter was collateral, and that, in any event, the military judge's ruling was correct under Mil. R. Evid. 412.

As the sole witness to the charged assault, Ms. KT's credibility was a critical issue in Appellant's court-martial. **[*133]** *See, e.g., United States v. Jasper, 72 M.J. 276, 281 (C.A.A.F. 2013)* (noting, in a child sexual assault case, "[t]here is little question that . . . the credibility of the putative victim is of paramount importance"). Indeed, we would think it the rare and unusual case where an accuser's credibility is *not* an issue available for defense exploration at trial. We agree that to the extent Ms. KT made false statements to investigators in the midst of an interview about the charged offense, and about matters closely related to that offense, such would reflect poorly on her character for truthfulness. *See, e.g., United States v. Montgomery, 56 M.J. 660, 667 (A. Ct. Crim. App. 2001)* ("[W]hether or not an individual lies to a police officer is highly probative of that individual's veracity."). Given the significance of Ms. KT's credibility, Appellant's right to confront her by attacking that credibility was impaired by the military judge's prohibition of the Defense's proposed cross-examination.

Ordinarily, we would grant military judges deference with respect to rulings on such evidence, but the military judge here did not analyze this proposed use of the evidence at all; instead, he focused on whether the evidence was admissible under a theory of consent under Mil. R. Evid. 412(b)(2). Although he found that the evidence was not "constitutionally **[*134]** required," this finding was made almost in passing in the middle of a longer discussion about whether the evidence related to consent or a mistaken belief of consent. The Defense,

however, articulated that an alternate purpose of the evidence was to undermine Ms. KT's credibility by cross-examining her about purportedly false statements she made about the evidence. As explained above, one of the Defense's overarching theories was that Ms. KT fabricated the assault, and she possibly did so under the influence of her mother. Thus, the motive and desire to use the evidence to impeach Ms. KT's character for truthfulness or to establish a character of untruthfulness was plainly articulated by the Defense. Because the military judge's ruling did not address this theory of admissibility, the military judge likewise did not conduct a Mil. R. Evid. 403 analysis of the probative value of allowing the Defense's proposed cross-examination to undermine Ms. KT's credibility. Her credibility was a critical issue at trial, and upon our de novo review, we find the military judge erred in concluding the exclusion of apparently false statements made by Ms. KT during her interview with law enforcement would not violate **[*135]** Appellant's constitutional rights.

Having found error related to Appellant's constitutional right to confront one of the witnesses against him, we turn to our assessment of whether or not the error was harmless beyond a reasonable doubt. We conclude it was. For one, Ms. KT's testimony—while important—was not the sole source of the evidence against Appellant. Post-assault text messages between Appellant and Ms. KT were admitted in evidence at trial. As discussed in more detail in Section II.B.3.d., *supra*, in those messages, Appellant made significant admissions—such as, "I should have stopped and listened to you."

We are also convinced that permitting Appellant to question Ms. KT about her statements to law enforcement regarding the recordings would not have meaningfully undermined her credibility. Ms. KT did not deny to the investigators that the recordings existed, but rather, denied she actively participated in their creation. This was a rather fleeting aspect of a lengthy interview and was not a subject either dwelled upon or returned to. Moreover, given the embarrassing nature of the topic, her apparent minimization of her role in recording sex acts between herself and Appellant **[*136]** does not render the remainder of her testimony any less believable. Thus, we conclude, a reasonable jury would not have received a significantly different impression of Ms. KT's credibility had the Defense been permitted to cross-examine her on this point. We further find, beyond a reasonable doubt, that the outcome of Appellant's trial with respect to the specification in which Ms. KT was a named victim would have been the same even with this cross-examination.

III. Conclusion

The finding of guilty as to Charge II and its Specification is **SET ASIDE** and **DISMISSED WITHOUT PREJUDICE**. The sentence is **SET ASIDE**. A rehearing is authorized with regard to the dismissed charge and specification and the sentence. The remaining findings are correct in law and fact, and are **AFFIRMED**. *Article 66(d), UCMJ, 10 U.S.C. § 866(d)*. The record of trial is returned to The Judge Advocate General. *Article 66(f), UCMJ, 10 U.S.C. § 866(f)*. Thereafter, *Article 66(b), UCMJ, 10 U.S.C. § 866(b)*, will apply. The court's earlier opinion of *United States v. Martinez, No. ACM 39903 (f rev), 2022 CCA LEXIS 202 (A.F. Ct. Crim. App. 31 Mar. 2022)* (unpub. op.), is hereby withdrawn.

End of Document

United States v. McClure

United States Army Court of Criminal Appeals

September 2, 2021, Decided

ARMY 20190623

Reporter
2021 CCA LEXIS 454 *; 2021 WL 4065525

UNITED STATES, Appellee v. Staff Sergeant, MICHAEL L. MCCLURE, United States Army, Appellant

Notice: NOT FOR PUBLICATION

Subsequent History: Petition for review filed by *United States v. McClure, 2021 CAAF LEXIS 943, 2021 WL 5173840 (C.A.A.F., Oct. 29, 2021)*

Motion granted by *United States v. McClure, 82 M.J. 92, 2021 CAAF LEXIS 952, 2021 WL 5832288 (C.A.A.F., Nov. 1, 2021)*

Motion granted by *United States v. McClure, 82 M.J. 105, 2021 CAAF LEXIS 1004 (C.A.A.F., Nov. 18, 2021)*

Review granted by *United States v. McClure, 82 M.J. 194, 2022 CAAF LEXIS 48, 2022 WL 514259 (C.A.A.F., Jan. 18, 2022)*

Motion granted by *United States v. McClure, 2022 CAAF LEXIS 443, 2022 WL 2659384 (C.A.A.F., June 23, 2022)*

Affirmed by *United States v. McClure, 2022 CAAF LEXIS 574 (C.A.A.F., Aug. 8, 2022)*

Prior History: [*1] Headquarters, Joint Readiness Training Center and Fort Polk. Douglas K. Watkins and Lanny J. Acosta, Jr., Military Judges. Colonel Thomas E. Schiffer, Staff Judge Advocate.

Case Summary

Overview
HOLDINGS: [1]-In an appeal of a rape and sexual assault conviction, military judge did not abuse his discretion in denying pretrial production of the victim's diary, and such was not a Brady violation, because the fact that the victim kept a diary in and of itself did not establish a right for the accused to see the diary, nor did it compel the presiding military judge to conduct an in camera review of said diary; [2]-There was no abuse of discretion in the military judge's conclusion that the victim's mental health records sought by appellant were, and remained, privileged under Mil. R. Evid. 513 and that such privilege had not been waived under Mil. R. Evid. 510 as appellant failed to show a specific factual basis demonstrating a reasonable likelihood that the records or communications would yield admissible evidence under an exception to the privilege.

Outcome
The findings of guilty and sentence were affirmed.

LexisNexis® Headnotes

Criminal Law & Procedure > Preliminary Proceedings > Discovery & Inspection > In Camera Inspections

HN1[] **Discovery & Inspection, In Camera Inspections**

The fact that a victim keeps a diary or journal, in and of itself, does not establish a right in an accused to see the diary, nor does it compel the presiding military judge to conduct an in camera review of said diary. Similarly, a victim diagnosed with a mental health disorder requiring the taking of prescribed medications does not, without more, mandate an in camera review of the victim's mental health records.

Criminal Law & Procedure > ... > Standards of Review > Abuse of Discretion > Discovery

Military & Veterans Law > ... > Courts Martial > Judges > Challenges to Judges

Military & Veterans Law > ... > Courts Martial > Evidence > Evidentiary Rulings

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

Military & Veterans Law > Military Justice > Disclosure & Discovery > Depositions & Interrogatories

HN2[] Abuse of Discretion, Discovery

An appellate court reviews a military judge's ruling on a discovery or production request for an abuse of discretion. The abuse of discretion standard calls for more than a mere difference of opinion. An abuse of discretion only occurs when the military judge's findings of fact are clearly erroneous, the court's decision is influenced by an erroneous view of the law, or the military judge's decision on the issue at hand is outside the range of choices reasonably arising from the applicable facts and the law.

Criminal Law & Procedure > ... > Discovery & Inspection > Brady Materials > Appellate Review

HN3[] Brady Materials, Appellate Review

Appellate review of discovery issues utilizes a two-step analysis: first, the court determines whether the information or evidence at issue was subject to disclosure or discovery; second, if there was nondisclosure of such information the court tests the effect of that nondisclosure on the appellant's trial.

Criminal Law & Procedure > ... > Discovery & Inspection > Discovery by Government > Appellate Review & Judicial Discretion

Military & Veterans Law > Military Justice > Disclosure & Discovery > Disclosure by Government

Military & Veterans Law > Military Justice > Disclosure & Discovery > Discovery by Defense

Criminal Law & Procedure > ... > Discovery by Defendant > Tangible Objects > Scope of Disclosure

Criminal Law & Procedure > ... > Discovery by Defendant > Tangible Objects > Appellate Review & Judicial Discretion

HN4[] Discovery by Government, Appellate Review & Judicial Discretion

Brady v. Maryland requires the prosecution to disclose to defense evidence that is material and favorable and in the possession of the prosecution. The requirement that such evidence be in the possession of the government is likewise reiterated in R.C.M. 701(a)(2), Manual Courts-Martial, which provides defense the opportunity to inspect any books, papers, documents, photographs, tangible objects, buildings, or places, or copies of portions thereof, which are within the possession, custody, or control of military authorities, and which are material to the preparation of the defense or are intended for use by the trial counsel as evidence in the prosecution case-in-chief at trial, or were obtained from or belong to the accused.

Military & Veterans Law > ... > Courts Martial > Sentences > Deliberations, Instructions & Voting

Military & Veterans Law > Military Justice > Disclosure & Discovery > Disclosure by Government

Military & Veterans Law > Military Justice > Disclosure & Discovery > Discovery by Defense

Military & Veterans Law > ... > Courts Martial > Sentences > Presentencing Proceedings

Military & Veterans Law > Military Justice > Apprehension & Restraint of Civilians & Military Personnel > Unlawful Restraint

HN5[] Sentences, Deliberations, Instructions & Voting

Trial counsel has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police. Evidence favorable to defense reasonably tends to either negate or reduce the guilt of an accused, or reduce the accused's punishment. R.C.M. 701(a)(6), Manual Courts-Martial. That duty, however, generally does not extend to evidence in the possession of witnesses or third parties unaffiliated with the government.

Military & Veterans Law > ... > Courts Martial > Sentences > Deliberations, Instructions & Voting

Military & Veterans Law > Military Justice > Disclosure & Discovery > Disclosure by Government

Military & Veterans Law > Military Justice > Disclosure & Discovery > Discovery by Defense

Military & Veterans Law > ... > Witnesses > Compulsory Attendance of Witnesses > Interrogation & Presentation

Military & Veterans Law > Military Justice > Search & Seizure > Searches Requiring Probable Cause

HN6[] **Sentences, Deliberations, Instructions & Voting**

Federal courts in interpreting Brady v. Maryland have imposed no duty on prosecutors to search for or obtain exculpatory evidence that is in the possession of cooperating witnesses. Moreover, R.C.M. 701(a)(6), Manual Courts-Martial, generally does not place on the Government the duty to search for exculpatory evidence held by people or entities not under the control of the Government, such as a witness.

Criminal Law & Procedure > ... > Discovery & Inspection > Brady Materials > Brady Claims

Criminal Law & Procedure > Appeals > Reversible Error > Discovery

HN7[] **Brady Materials, Brady Claims**

To establish a Brady violation, appellant must establish: (1) that the evidence at issue was favorable, either because of its exculpatory nature or value as impeachment evidence; (2) that the favorable evidence was suppressed, either intentionally or inadvertently, by the government; and (3) the failure to disclose resulted in prejudice. Because Brady evidence has the twin requirement that the evidence be both favorable and material, a Brady violation is always prejudicial there is no such thing as a harmless Brady violation. Prejudice is baked into every Brady violation.

Military & Veterans Law > ... > Evidence > Privileged Communications > Psychotherapist-Patient Privilege

HN8[] **Privileged Communications, Psychotherapist-Patient Privilege**

A patient has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made between the patient and a psychotherapist if such communication was made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition. Mil. R. Evid. 513(a). Waiver occurs if the privilege holder voluntarily discloses or consents to the disclosure of any significant part of the matter or communication under such circumstances that it would be inappropriate to allow such a claim of privilege. Mil. R. Evid. 510(a).

HN9[] Disclosures made to a medical provider for the purposes of and with the expectation of receiving medical treatment, do not constitute waiver of the psychotherapist-patient privilege or allow third party access to all related mental health records.

Military & Veterans Law > ... > Witnesses > Compulsory Attendance of Witnesses > Interrogation & Presentation

HN10[] **Compulsory Attendance of Witnesses, Interrogation & Presentation**

Waiver under Mil. R. Evid. 510 requires, in part: (1) disclosure; (2) of any significant part of the matter or communication; and (3) under such circumstances that it would be inappropriate to allow the claim of privilege.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Military & Veterans Law > Military Justice > Disclosure & Discovery > Disclosure by Government

HN11[] **Procedural Due Process, Scope of**

Protection

Mental health records located in military or civilian healthcare facilities that have not been made part of an investigation are not in the possession of prosecution and therefore cannot be Brady evidence. In other words, failure to provide the accused with a victim's mental health records, records the government did not have, does not implicate the accused's right to due process.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Right to Confrontation

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Confrontation

HN12[] **Criminal Process, Right to Confrontation**

In Pennsylvania v. Ritchie, the Supreme Court noted that the Sixth Amendment right to confront witnesses is a trial right, not a discovery right. The constitutional right to confront witnesses does not include the right to discover information to use in confrontation. The right to question adverse witnesses does not include the power to require the pretrial disclosure of any and all information that might be useful in contradicting unfavorable testimony.

Counsel: For Appellant: Captain Thomas J. Travers, JA; Frank J. Spinner, Esquire (on brief and reply brief).

For Appellee: Colonel Steven P. Haight, JA; Lieutenant Colonel Wayne H. Williams, JA; Major Brett A. Cramer, JA; Lieutenant Colonel Jaired D. Stallard, JA (on brief).

Judges: Before ALDYKIEWICZ, EWING,[1] and WALKER, Appellate Military Judges. Judge EWING and Judge WALKER concur.

Opinion by: ALDYKIEWICZ

Opinion

MEMORANDUM OPINION

ALDYKIEWICZ, Senior Judge:

HN1[] The fact that a victim keeps a diary or journal (hereinafter diary), in and of itself, does not establish a right in an accused (hereinafter appellant) to see the diary, nor does it compel the presiding military judge to conduct an in camera review of said diary. Similarly, a victim diagnosed with a mental health disorder requiring the taking of prescribed medications does not, without more, mandate an in camera review of the victim's mental health records.

Appellant[2] alleges the military judge erred in denying the pretrial production of the victim's diary, claiming entitlement under *Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963)* and a violation thereof **[*2]** for failure to produce the diary. Further, appellant alleges a violation of Military Rule of Evidence [Mil. R. Evid.] 510 and 513 when the military judge refused to review, in camera, and produce the mental health records of the victim, arguing that: (1) the victim waived any privilege as to the mental health records; and (2) release of the records was constitutionally required. We disagree.[3]

I. BACKGROUND

Appellant and victim met on-line via the dating app "Plenty of Fish." After communicating telephonically and exchanging text messages, the two met in person the evening of 29 September 2018. After driving separate vehicles to a local Dairy Queen, the two traveled in appellant's vehicle, first to a local lake, then a hunting area, and eventually to appellant's apartment where they proceeded to appellant's bedroom to watch movies.

Shortly after entering appellant's bedroom, appellant and victim paused the movie they were watching and engaged in consensual vaginal intercourse. Afterwards, the two continued to watch the movie. Approximately

[1] Judge Ewing decided this case while serving on active duty.

[2] A general court-martial, enlisted panel, convicted appellant of rape and sexual assault in violation of *Article 120*, Uniform Code of Military Justice, *10 U.S.C. § 920* [UCMJ]. The panel sentenced appellant to a dishonorable discharge, confinement for five years, forfeiture of all pay and allowances, reduction to the grade of E-1, and a reprimand. With the exception of the forfeitures, the convening authority approved the adjudged sentence, awarding appellant 68 days of confinement credit against his adjudged period of confinement.

[3] In addition to his two assignments of error, appellant also raised, pursuant to *United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982)*, ineffective assistance of counsel and factual insufficiency. Having fully and fairly considered all assignments of error, those assigned (i.e., briefed) and those personally raised by appellant pursuant to *Grostefon*, we find none have merit and therefore no relief is warranted.

thirty minutes later, the two again engaged in consensual vaginal intercourse, albeit victim described appellant's actions this time as rougher, causing her pain. At one point, appellant asked **[*3]** victim to get on her hands and knees, which she did, as he penetrated her vaginally from behind. Appellant then digitally penetrated victim's anus. When he attempted to do the same, this time with his penis, victim pulled away, telling appellant "no, I don't want to have anal sex." After verbally expressing her lack of consent to any anal penetration, victim told appellant that she "[found anal sex] disgusting and degrading and it is just uncomfortable." Appellant responded by saying "okay, we won't do that."

The two then continued to have consensual vaginal intercourse. Notwithstanding his earlier statement that "we won't do that," appellant again digitally penetrated victim anally and, before she could say no again, penetrated her anally with his penis. Although victim asked appellant to stop multiple times, he continued to penetrate victim, at one point responding to her protestations by saying, "Baby, I want to f[***] you in the ass like this every night." Despite being asked four times to stop, appellant continued to anally penetrate victim with his penis. Eventually victim was able to pull herself away from appellant.

Now crying, victim asked appellant to take her back to her vehicle **[*4]** still parked at Dairy Queen. Although frustrated by her request to leave, appellant acquiesced, but not before showering and telling victim "not to go telling [anybody] that it was rape because it wasn't," or words to that effect. Once back at Dairy Queen, victim attempted to contact her mother but was unable to do so. She eventually made contact with her father who reached her mother who, along with victim's brother, met victim at Dairy Queen. Victim was then taken to a local hospital where the staff called law enforcement authorities. At the hospital, victim provided a statement about the sexual assault to several police officers, one of whom was a detective. The detective told victim about a sexual assault examination that, if she consented, would be conducted by a sexual assault nurse examiner (SANE). The detective advised victim that a SANE exam "would be good in collecting evidence that [she] had indeed had a sexual experience" with appellant. He also advised victim that "they would need to put [her] on medicine for sexually transmitted diseases." Victim consented to the exam, in part to receive medication because she "didn't want to get sick."

Because the SANE was on another **[*5]** call in another parish, victim's SANE exam was scheduled for the next day, 30 September 2018. At the beginning of the exam, the SANE asked victim "health questions." When asked about any mental disabilities, victim stated she suffered from "bipolar with depression" and ADHD [attention-deficit/hyperactivity disorder]. Victim also provided the SANE with "a list of medication," seven in total, that she was taking. During the exam, victim was given "three shots," some "oral antibiotics," and "an Oral Plan B pill."

On 16 July 2019, during a meeting between trial counsel and victim, victim advised trial counsel she had disclosed to the SANE her mental health diagnoses as well as the medications she was taking. Additionally, victim advised trial counsel that she kept a diary. Trial counsel was not provided the diary and was unaware of its contents.

On 17 July 2019, trial counsel spoke with defense counsel telephonically about victim's interview.

On 15 August 2019, the government discussed victim's diary with defense counsel and noted the diary may[4] contain information relevant to the defense.

On 16 August 2019, the defense requested preservation and production of the diary. In response, the government **[*6]** asked victim to provide the diary.

On 26 August 2019, the government notified the defense that victim, at the suggestion of an unknown medical professional,[5] refused their request to turn over the diary. At this point, neither trial nor defense counsel were aware of what was contained within the diary.

Pretrial Litigation

Pretrial, the defense moved to compel production of "all diaries, journals, or personal writings belonging to the

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[4] During the pretrial litigation, defense argued that "the government has conceded the diary was relevant and necessary." However, the government explained that their prior notification to defense of the diary's existence and any prior efforts to obtain the same from victim did not constitute any concession that the diary was either "relevant" or "necessary." During argument on the defense motion to produce the diary, the government made clear that they had not seen the diary nor did they have any knowledge regarding its contents.

[5] At trial, victim testified that the advice to retain (i.e., not turnover) the diary came from her therapist.

victim" and "any and all medical and mental-health records of [victim], as pertains to her treatment for and diagnosis of bipolar disorder, depression, and/or attention-deficit/hyperactivity disorder." The defense request included "all treatment records, provider notes, tests performed, evidence of manifested symptoms, medications prescribed, and provider conclusions." The government opposed both motions.

The military judge denied both defense motions. The military judge noted the defense failed to establish that any relevant evidence would be found in the diary, a fact conceded in the defense's pretrial motion for production.[6] Regarding the mental health records, after finding that the records were protected by Mil. R. Evid. 513, the military judge noted:

> The court finds that **[*7]** the disclosure of previous diagnoses and prescriptions to a medical provider in the course of treatment does not constitute a waiver of privilege under M.R.E. 510. Interpreting such actions as a waiver would eviscerate the privilege and effectively prevent any patient from the ability to disclose basic information to other providers without waiving the right to access privileged communications.

Cross-Examination at Trial

At trial, victim disclosed to the parties-for the first time-that she had written about the assault in her diary. During cross-examination of victim the following colloquy occurred between victim (V) and defense counsel (DC).

> DC: All right. [Victim], we're going to stay on the topic of your notebook but I'm going to change the question. Do [you] write in it about what happens to you?
>
> V: I have a notebook that I wrote about what **[*8]** happened.
> DC: Containing information about this assault?
> V: Yes, sir.
> DC: And how it affected you?
> V: Some.
> DC: And what actually happened that day?
> V: Yes, sir.
> DC: Did you turn this over?
> V: No.
> DC: It was your decision to not turn it over, correct?
> V: It was my decision after being counseled by my therapist.
> DC: That was the same therapist that gave you all those medications that you talked about earlier?
> V: No, sir. The therapist does not prescribe medication.
> DC: When I say decided not to turn it over, you didn't turn it over to the defense but did you turn it over to the prosecution?
> V: No, sir.
> DC: You didn't turn it over to the court?
> V: No.

After cross-examination, defense counsel did not renew its request for production of the diary.

II. LAW AND DISCUSSION

A. Standard of Review

HN2[↑] This court reviews a military judge's ruling on a discovery or production request for an abuse of discretion. *United States v. Chisum, 77 M.J. 176, 179 (C.A.A.F. 2018)*; *United States v. Stellato, 74 M.J. 473, 480 (C.A.A.F. 2015)*. "The abuse of discretion standard calls for more than a mere difference of opinion." *United States v. Wicks, 73 M.J. 93, 98 (C.A.A.F. 2014)* (citations omitted). An abuse of discretion only occurs "when [the military judge's] findings of fact are clearly erroneous, the court's decision is influenced by an erroneous view of the law, or the military judge's decision **[*9]** on the issue at hand is outside the range of choices reasonably arising from the applicable facts and the law." *United States v. Miller, 66 M.J. 306, 307 (C.A.A.F. 2008)*.

HN3[↑] Appellate review of discovery issues "utilizes a two-step analysis: first, the court determines whether the information or evidence at issue was subject to disclosure or discovery; second, if there was nondisclosure of such information" the court tests the "effect of that nondisclosure on the appellant's trial." *United States v. Roberts, 59 M.J. 323, 325 (C.A.A.F. 2004)*.

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[6] The defense motion noted, in part:

> [Victim's] diary is both relevant and necessary to the Defense as it is likely to contain evidence that will affect her credibility. [Victim] has so far exercised her right to not speak with Defense prior to trial. Therefore the Defense does not know as a matter of certainty what the diary contains. However, [victim] mentioned the diary to the Government.

B. The Victim's Diary

HN4[] *Brady v. Maryland* requires the prosecution to disclose to defense evidence that is material and favorable and in the possession of the prosecution. 373 U.S. 83, 84-88, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). The requirement that such evidence be in the possession of the government is likewise reiterated in Rule for Courts-Martial [R.C.M.] 701(a)(2), which provides defense the opportunity to inspect:

> [a]ny books, papers, documents, photographs, tangible objects, buildings, or places, or copies of portions thereof, which are *within the possession, custody, or control of military authorities*, and which are material to the preparation of the defense or are intended for use by the trial counsel as evidence in the prosecution case-in-chief at trial, or were obtained from or belong to the accused[.]

(emphasis added).

HN5[] Trial counsel has "a duty to learn **[*10]** of any favorable evidence known to the others acting on the government's behalf in the case, including the police." Kyles v. Whitley, 514 U.S. 419, 437, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995). Evidence favorable to defense reasonably tends to either negate or reduce the guilt of an accused, or reduce the accused's punishment. R.C.M. 701(a)(6). That duty, however, generally does not extend to evidence in the possession of witnesses or third parties unaffiliated with the government. United States v. Stellato, 74 M.J. 473, 486 (C.A.A.F. 2015). As our superior court explained in *Stellato*:

> [W]e recognize that the federal courts in interpreting Brady v. Maryland have imposed no duty on prosecutors to search for or obtain exculpatory evidence that is in the possession of cooperating witnesses. HN6[] Moreover, R.C.M. 701(a)(6) generally does not place on the Government the duty to search for exculpatory evidence held by people or entities not under the control of the Government, such as a witness.

Id. (internal citations omitted).

HN7[] To establish a *Brady* violation, appellant must establish: (1) that the evidence at issue was favorable, either because of its exculpatory nature or value as impeachment evidence; (2) that the favorable evidence was suppressed, either intentionally or inadvertently, by the government; and (3) the failure to disclose resulted in prejudice. **[*11]** Banks v. Dretke, 540 U.S. 668, 691, 124 S. Ct. 1256, 157 L. Ed. 2d 1166 (2004); Strickler v. Greene, 527 U.S. 263, 281-82, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999); United States v. Hawkins, 73 M.J. 605, 610 (Army Ct. Crim. App. 2014). "Because '*Brady* evidence' has the twin requirement that the evidence be both favorable and material, a *Brady* violation is *always* prejudicial . . . there is no such thing as a harmless *Brady* violation. 'Prejudice' is baked into every *Brady* violation." United States v. Ellis, 77 M.J. 671, 675 (C.A.A.F. 2018) (internal citations omitted) (emphasis in original).

Appellant argues that "[b]ecause the whole case rested on whether consent was given to the sexual acts alleged, the diary was essential to resolving this central issue." The appellant relies on *Stellato* as support for the government's obligation to (1) obtain victim's diary and (2) turn the same over to the defense. Appellant's reliance on *Stellato* is misplaced. In *Stellato*, the government had access to relevant and material evidence (i.e., the "box of evidence") by simply asking for it. 74 M.J. at 486. In the case at bar, the government lacked such access. The prosecutor in *Stellato* affirmatively and specifically declined to examine the contents of the "box of evidence" despite the witness's explicit offer for him to do so. *Id.* In the case at bar, victim did not offer the government, or defense, the opportunity to review her diary. In *Stellato*, rather than search the "box of evidence" or take **[*12]** possession of it, trial counsel cautioned the witness about giving him any evidence, advising the witness that everything he received "will go to defense." Id. at 487. In appellant's case, victim received no advice, legal or otherwise, from the prosecutors vis-a-vis what to do with her diary. In *Stellato*, the prosecutor failed to timely disclose the existence of the "box of evidence" to the defense. Id. at 488. In appellant's case, the prosecutors timely notified defense about the diary and sought to obtain the diary from the victim, a request victim denied upon advice of her therapist. Finally, in *Stellato*, the prosecutor chose to ignore the evidence at issue and its exculpatory nature. "By effectively remaining willfully ignorant as to the contents of that box and by not disclosing its existence to the defense, [trial counsel] did not disclose exculpatory evidence 'as soon as practicable'" as required by R.C.M. 701(a)(6). Id. at 487-88.

In appellant's case, the undisputed facts are as follows: (1) victim had a diary; (2) victim "wrote about what happened" on 29 September 2018 and how it affected her, a fact unknown to the parties until cross-examination on the merits by defense counsel; (3) victim

advised government counsel about **[*13]** the diary;[7] (4) government counsel advised defense about the diary's existence; (5) victim refused the government's request to produce the diary based upon advice of her therapist (which caused the government to proceed with caution, concerned that further efforts to obtain the diary could run afoul of victim's psychotherapist-patient privilege); (6) government counsel provided no advice to the victim vis-a-vis what to do with the diary; (7) government counsel never had access to the diary; and (8) neither government nor defense counsel was, or is, aware of the substance of what victim wrote in her diary regarding the 29 September 2018 events with appellant.

At the time of defense's motion to produce, and the military judge's ruling at issue, neither government counsel, defense counsel, nor the court was aware of anything other than victim kept a diary. On the record before us, only after cross-examination by defense counsel did the parties become aware of the fact that victim wrote about what happened on 29 September 2018 and how it made her feel. The substance of what she wrote, how much she wrote, and whether her writing(s) inculpated or exculpated appellant remains unknown.

Having **[*14]** examined the pretrial motions regarding the diary, the military judge's pretrial ruling denying production, the trial counsel's actions, victim's testimony on the merits, and *United States v. Stellato*, we find no abuse of discretion in the military judge's ruling. When defense sought the diary, they did so on the assumption that victim wrote about the sexual assaults, further assuming that her writing(s) were relevant and necessary. Producing nothing more than speculation in support of their motion, the military judge properly denied production of the diary.[8]

C. Victim's Mental Health Records - Rx, Diagnoses, and Nothing More

1. Waiver of Mil. R. Evid. 513 Privilege

HN8[↑] "A patient has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made between the patient and a psychotherapist . . . if such communication was made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition." Mil. R. Evid. 513(a). Waiver occurs if the privilege holder "voluntarily discloses or consents to the disclosure of any significant part of the matter or communication under such circumstances that it would be inappropriate to allow such a claim **[*15]** of privilege." Mil. R. Evid. 510(a).

In the defense motion[9] for an in camera review, counsel argued victim waived any privilege regarding her mental health records by disclosing, during victim's SANE exam, both her mental health diagnoses-diagnoses noted on page 1 of the forensic sexual assault evaluation form[10] under "Mental disabilities,"-as well as her seven prescribed medications noted on the same page of the forensic sexual assault evaluation form under "Current Medications." The defense argued victim's disclosures amounted to a "significant part of the matter," resulting in a complete waiver of all medical

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[7] Although not raised by the parties, we find no R.C.M. 914 or *Jencks Act* violation as the diary was never in the "possession of the United States." R.C.M. 914(a)(1).

[8] As stated earlier in the facts, the defense failed to renew its request for production of the diary after cross-examining victim. Pretrial, defense counsel failed to establish the relevance of or necessity for the diary. Their request for production was nothing more than a fishing expedition based on an assumption. Once victim testified that she did in fact write about what happened on 29 September 2018, defense did not seek any relief at that point. That is, defense failed to renew or seek reconsideration of its motion for production, or request a mistrial or abatement of the proceedings, until such time as the diary was produced. Unaware of any obligation by the military judge to sua sponte revisit earlier rulings that may or may not be affected by additional evidence discovered during the merits portion of the proceedings, our ruling herein finding no abuse of discretion is limited to the facts before the military judge at the time of his ruling on the motion. Further, as ineffective assistance of counsel (IAC) for failure to renew the defense motion or seek abatement or a mistrial is not raised, nothing herein should be viewed as commentary on the effectiveness of counsel. Appellant's *Grostefon* submission does raise IAC but only as to appellant's failure to testify based upon advice of counsel. No IAC claim is raised regarding counsel's handling of discovery.

[9] The defense pretrial motion and accompanying exhibits are sealed in accordance with (IAW) Mil. R. Evid. 513(e)(6) and R.C.M. 1103A. Any reference to or excerpts from said motion and/or accompanying exhibits refers to non-privileged information therein notwithstanding the sealed nature of the exhibit.

[10] The forensic sexual assault evaluation form, comprised of nine pages, is embedded in the State of Louisiana Sexual Assault Response Team (SART) Initial Report, dated 29 September 2018 and admitted as Prosecution Exhibit 7.

and mental health records associated with the diagnosed and disclosed disorders. Additionally, the defense argued the evidence was constitutionally required because "constitutionally required evidence very likely exists within the mental health records."[11] We disagree.

During the motions hearing,[12] neither side called any witnesses, relying solely on their written pleadings and any attachments thereto.[13] Defense counsel argued that the evidence sought went to the victim's credibility. Regarding the medications, defense argued "those medications are psychotropic in nature and so because of the combination of those it might lend to some credibility concerns at trial that the panel might like to hear about." The government responded by noting, appropriately so, that defense failed to produce any evidence, expert or otherwise, regarding **[*17]** the effects of any of the medications disclosed by victim during her SANE exam.[14]

The following colloquy between the military judge and defense counsel, regarding victim's diagnoses and prescribed medications occurred:

MJ: But you have it [SANE exam disclosures], right?

DC: I do.

MJ: You have all of the things that she said about, I'm diagnosed with X, Y, and Z and I take 1, 2, and 3.

DC: Yes, Your Honor.

MJ: And you can inquire into all of those things when she's on the stand.

DC: Yes, Your Honor.

MJ: And you can call an expert witness to talk about those things. What X, Y, and Z and 1, 2, and 3 mean in conjunction with each other, right?

DC: Yes, Your Honor.

After finding that the records sought by the defense were protected under Mil. R. Evid. 513, the military judge addressed waiver under Mil. R. Evid. 510, finding, under the circumstances, that victim did not waive the Mil. R. Evid. 513 privilege.

> [T]he disclosure of previous diagnoses and prescriptions to a medical provider in the course of treatment does not constitute a waiver of privilege under M.R.E. 510. Interpreting such actions as a waiver would eviscerate the privilege and effectively prevent any patient from the ability to disclose basic information to other providers without waiving the right **[*18]** to access privileged communications.[15]

This panel, in an unpublished opinion, previously held that neither one's diagnosed disorder nor the medications prescribed to treat said disorder are

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[11] In its brief, defense claimed:

> There are several gaps in current knowledge which only the complaining witness' medical and behavioral health records can confirm. These include:
>
> 1) Whether [victim] has actually been diagnosed with depression, attention-deficit/hyperactivity disorder, or bipolar disorder.
>
> 2) Whether she was actually prescribed the psychotropic medications **[*16]** she indicated;
>
> 3) The impacts of the previously mentioned disorder on [victim's] behavior and memory;
>
> 4) Whether her prescriptions have any impact on her ability to recall specific details;
>
> 5) What other side effects may be experienced by [victim];
>
> 6) What happens if she does not take her medications;
>
> 7) Whether she has any additional diagnoses secondary to those that have been mentioned so far; and
>
> 8) Whether she has manifested any of the specific symptoms which could lead to challenges to her credibility (i.e., memory or perceptions problems, history of delusion, history of thrill seeking, history of attention seeking, etc.).

[12] The transcript pages related to the Mil. R. Evid. 513 hearing are sealed IAW Mil. R. Evid. 513(e)(6) and 1103A. Any reference to or excerpts from said motions hearing refers to non-privileged information therein notwithstanding the sealed nature of said transcript pages.

[13] At the time of the motions hearing, the defense had a forensic psychiatrist appointed as a member of the defense team, however, that expert was not called as a witness.

[14] See FN 12 supra. Additionally, defense counsel's statement about the disclosed drugs is rebutted by victim's testimony in court. One of the drugs disclosed during the SANE exam was "Syeda," a birth control drug.

[15] The military judge's ruling is sealed IAW Mil. R. Evid. 513(e)(6) and 1103A. Any reference to or excerpts from said ruling refers to non-privileged information therein notwithstanding the sealed nature of the ruling.

"confidential communications" for purposes of claiming a privilege under Mil. R. Evid. 513. *United States v. Rodriguez, ARMY 20180138, 2019 CCA LEXIS 387, at *8 (Army Ct. Crim. App. 1 Oct. 2019)* (mem. op.). The Navy-Marine Court of Criminal Appeals, in a recent opinion, disagreed. *United States v. Mellette, No. 201900305, 81 M.J. 681, 2021 CCA LEXIS 234 (N.M. Ct. Crim. App. 14 May 2021)* (holding that both the diagnosis by the psychotherapist as well any prescribed medications are covered by the privilege under Mil. R. Evid. 513).

On the record before us, we need neither justify our position in *Rodriguez* nor distinguish our sister service court's decision in *Mellette*. Victim herein voluntarily disclosed, at trial, her diagnoses (i.e., bipolar, depression, and ADHD) as well as the seven medications noted during her SANE exam. Stated another way, victim did not claim any privilege regarding what she told the SANE on 30 September, leaving us only with the issue of whether victim's 30 September SANE disclosures waived any privilege as to her underlying mental and behavioral health records. It does not.

HN9[↑] As the military judge noted in his ruling, disclosures made to a medical provider for the purposes of and with the expectation of receiving medical **[*19]** treatment, do not constitute waiver of the psychotherapist-patient privilege or allow third party access to all related mental health records.[16] To rule otherwise would, as the military judge noted, "eviscerate the privilege and effectively prevent any patient from the ability to disclose basic information to other providers without waiving the right to access privileged communications." Our research has found no court decision holding otherwise and defense counsel, at both the trial and appellate level, have provided none.

Appellee, however, points to *United States v. Babarinde, 126 F. Supp. 3d 22 (D.C. Cir. 2015)*, as support for the position that disclosure of diagnoses and medications, without more, do not constitute a Mil. R. Evid. 513 waiver for all related mental health records. In *Babarinde* the court found no waiver when the patient testified to her diagnoses, the medications she was taking, and the effect of said medications on her emotional and mental abilities during a competency hearing. *Id. at 25*. We agree and find no abuse of discretion in the military judge's conclusion that the mental health records sought by appellant were, and remained, privileged notwithstanding victim's disclosures to the SANE and captured in the forensic sexual assault **[*20]** evaluation form.

HN10[↑] Waiver under Mil. R. Evid. 510 requires, in part: (1) "disclosure"; (2) "of any significant part of the matter or communication"; and (3) "under such circumstances that it would be inappropriate to allow the claim of privilege." While we find that victim's disclosure did not open the door to her underlying records, even if we were to find (1) and (2) above, recognizing the privilege under victim's circumstances (i.e., made in the course of receiving medical treatment following a sexual assault) is not recognition of a privilege "under such circumstances that it would be inappropriate to allow the claim of privilege."

2. In Camera Review of Mental Health Records

As part of their motion to compel production of victim's mental health records, defense counsel requested the military judge conduct an in camera review of said records. Beyond claiming that victim's credibility was central to the case, as is often the case in a sexual assault prosecution, the defense offered no evidence regarding victim's three diagnosed conditions or her prescribed medications.[17] After considering defense counsel's argument, the military judge found that "no production, disclosure, or in camera review [was] required." **[*21]** Specifically, the military judge found that defense failed to show, by a preponderance, that "a specific factual basis demonstrating a reasonable

[16] Our concurrence with the military judge relates to appellant's access to victim's mental and behavioral health records related to the diagnoses and prescribed medications disclosed during the SANE exam and reported in the forensic sexual assault evaluation form. Our opinion is unchanged regardless of whether the diagnoses and medications are viewed as non-privileged under *Rodriguez*, privileged under *Mellette*, or privileged but waived by disclosure to the SANE on 30 September 2018. Victim ultimately testified, on the merits, to both her varied diagnoses and the seven medications disclosed and captured in the forensic sexual assault evaluation form.

[17] Although defense had a forensic psychiatrist appointed to the defense team, defense did not use their expert to explain how the varied diagnoses, medications, or both might affect credibility or memory or decision making or any behavior relevant to the defense's theory of the case. Rather, the defense elected to simply cross-examine the victim on her varied diagnoses, medications, and their effect upon her to include her credibility.

likelihood that the records or communications would yield admissible evidence under an exception to the privilege." *See* Mil. R. Evid. 513(e)(3)(A). Additionally, the defense was "unable to demonstrate by a preponderance of the evidence how [the information sought] would be different and thus not cumulative" from information available from the forensic sexual assault evaluation form itself. *See* Mil. R. Evid. 513(e)(3)(C). We presume counsel are competent. *United States v. Scott, 24 M.J. 186, 188 (C.M.A. 1987)* ("The competence of counsel is presumed."). Absent evidence to the contrary, of which there is none, we presume that counsel made a tactical decision not to call their forensic psychiatrist to discuss either victim's diagnoses or the medications she was taking. Likewise, we presume that defense counsel's limited cross-examination of victim regarding both was also a tactical decision by defense. That said, it should be no surprise to any litigant when a military judge refuses to conduct an in camera review and pierce the psychotherapist-patient privilege when all the judge is given are diagnoses, a list of medications, and nothing more.

We **[*22]** find no abuse of discretion in the military judge's conclusion that, at trial, appellant failed to show, by a preponderance, that "a specific factual basis demonstrating a reasonable likelihood that the records or communications would yield admissible evidence under an exception to the privilege."[18]

3. Constitutionally Required

Finally, appellant cites to a constitutional right to discover victim's mental health records, arguing that the military judge's ruling effectively denied him due process and the right of confrontation. We disagree.

Appellant's due process and discovery argument implicates *Brady*. However, as this court noted several years ago, "information under the control of the 'prosecution' is not the same as information under the control of the entire government." *United States v. Shorts, 76 M.J. 523, 532 (Army Ct. Crim. App. 2017)*. Privileged information stored in a hospital's system of records is not within the possession or control of the "prosecution" for *Brady* purposes. ***HN11***[↑] "Mental health records located in military or civilian healthcare facilities that have not been made part of the investigation are not 'in the possession of prosecution' and therefore cannot be 'Brady evidence.'" *Lk v. Acosta, 76 M.J. 611, 616 (Army Ct. Crim. App. 2017)*. In other words, failure to provide appellant with victim's mental health records, records the government did not have, does not implicate appellant's right to due process.

Similarly, the military judge's ruling did not undermine appellant's confrontation rights. ***HN12***[↑] In *Pennsylvania v. Ritchie*, the Supreme Court noted that the *Sixth Amendment* right to confront witnesses is a trial right, not a discovery right. *480 U.S. 39, 52, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987)*. The constitutional right to confront witnesses does not include the right to discover information to use in confrontation. *Id. at 52*. The right to question adverse witnesses "does not include the power to require the pretrial disclosure of any and **[*23]** all information that might be useful in contradicting unfavorable testimony." *Id. at 53*.

Appellant's constitutional argument amounts to little more than a claimed right to discover information, regardless of any privilege, that may or may not prove useful in their cross-examination of victim. Such an absolute right, however, does not exist.

III. CONCLUSION

We find no abuse of discretion in the military judge's decision regarding nondisclosure of victim's diary, nondisclosure of victim's mental health records, and refusal to conduct an in camera review of victim's mental health records.

The findings of guilty and the sentence are AFFIRMED.

Judge EWING and Judge WALKER concur.

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[18] Having found no abuse of discretion regarding the military judge's ruling vis-a-vis the first prong of Mil. R. Evid. 513(e)(3), to wit: 513(e)(3)(A), we need not reach his ruling regarding prong three of Mil. R. Evid. 513(e)(3), to wit: 513(e)(3)(C).

United States v. Neis

United States Air Force Court of Criminal Appeals

February 27, 2020, Decided

No. ACM 39537

Reporter
2020 CCA LEXIS 60 *; 2020 WL 1064811

UNITED STATES, Appellee v. Joseph L. NEIS, Technical Sergeant (E-6), U.S. Air Force, Appellant

Notice: NOT FOR PUBLICATION

Subsequent History: Writ of habeas corpus denied *In re Neis, 2020 CCA LEXIS 66 (A.F.C.C.A., Feb. 27, 2020)*

Motion granted by *United States v. Neis, 2020 CAAF LEXIS 237 (C.A.A.F., Apr. 27, 2020)*

Review denied by *United States v. Neis, 2020 CAAF LEXIS 369 (C.A.A.F., July 15, 2020)*

Prior History: [*1] Appeal from the United States Air Force Trial Judiciary. Military Judge: Ryan A. Hendricks; L. Martin Powell (sentence rehearing). Approved sentence: Dishonorable discharge, confinement for 5 years, and reduction to E-3. Sentence adjudged 26 April 2018 by GCM convened at Joint Base Langley-Eustis, Virginia.

United States v. Neis, 79 M.J. 209, 2019 CAAF LEXIS 545 (C.A.A.F., July 29, 2019)

Case Summary

Overview

HOLDINGS: [1]-Military judge (MJ) did not abuse his discretion in admitting testimony regarding uncharged conduct under Mil. R. Evid. 413, Manual Courts-Martial (MCM), where appellant was charged with multiple offenses of sexual assault; the proffered testimony was evidence of another, uncharged offense of sexual assault which, although not completed, qualified as a sexual offense; the evidence had logical relevance to the charged offense, and the MJ balanced its probative value against any countervailing interests; [2]-MJ properly held that a rape committed after the January 2006 amendment to *10 U.S.C.S. § 843(a)* was not subject to any statute of limitations; [3]-MJ properly held that the victim's brief references to advice she received from her therapist did not waive her Mil. R. Evid. 513, MCM, privilege with respect to other communications with any psychotherapist.

Outcome
The findings and sentence were affirmed.

LexisNexis® Headnotes

Military & Veterans Law > ... > Courts Martial > Evidence > Evidentiary Rulings

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN1 **Evidence, Evidentiary Rulings**

A military judge's decision to admit evidence is reviewed for an abuse of discretion. A military judge abuses his discretion when: (1) the findings of fact upon which he predicates his ruling are not supported by the evidence of record; (2) if incorrect legal principles were used; or (3) if his application of the correct legal principles to the facts is clearly unreasonable.

Military & Veterans Law > Military Offenses > Rape & Sexual Assault

Military & Veterans Law > ... > Evidence > Admissibility of Evidence > Sex Offenses

HN2 **Military Offenses, Rape & Sexual Assault**

Mil. R. Evid. 413, Manual Courts-Martial, provides that in a court-martial proceeding for a sexual offense, a

military judge may admit evidence that the accused committed any other sexual offense. The evidence may be considered on any matter to which it is relevant. Mil. R. Evid. 413(a). This includes using evidence of either a prior sexual assault conviction or uncharged sexual assaults to prove that an accused has a propensity to commit sexual assault. For purposes of Mil. R. Evid. 413, a "sexual offense" includes, inter alia, any conduct prohibited by Unif. Code Mil. Justice art. 120, *10 U.S.C.S. § 920*, and an attempt to engage in such conduct. Mil. R. Evid. 413(d)(1), (6), Manual Courts-Martial.

Military & Veterans
Law > ... > Evidence > Relevance > Confusion, Prejudice & Waste of Time

Military & Veterans
Law > ... > Evidence > Admissibility of Evidence > Sex Offenses

HN3 **Relevance, Confusion, Prejudice & Waste of Time**

Military judges are required to make three threshold findings before admitting evidence under Mil. R. Evid. 413, Manual Courts-Martial: (1) the accused is charged with an offense of sexual assault; (2) the evidence proffered is evidence of his commission of another offense of sexual assault; and (3) the evidence is relevant under Mil. R. Evid. 401 and 402, Manual Courts-Martial. Additionally, the military judge must apply the balancing test of Mil. R. Evid. 403, Manual Courts-Martial, to determine whether the probative value of the proffered evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or other countervailing considerations.

Military & Veterans
Law > ... > Evidence > Relevance > Confusion, Prejudice & Waste of Time

Military & Veterans
Law > ... > Evidence > Admissibility of Evidence > Sex Offenses

HN4 **Relevance, Confusion, Prejudice & Waste of Time**

In Wright, the United States Court of Appeals for the Armed Forces (CAAF) set forth a non-exclusive list of factors to be considered under Mil. R. Evid. 403, Manual Courts-Martial, in the context of Mil. R. Evid. 413, Manual Courts-Martial, evidence: the strength of the proof of the prior act of sexual assault; the probative weight of the evidence; the potential for less prejudicial evidence; distraction of the factfinder; the time needed for proof of the prior conduct; the temporal proximity of the prior conduct to the charged offense(s); the frequency of the acts; the presence or absence of intervening circumstances between the prior acts and charged offenses; and the relationship between the parties involved. However, the CAAF has stated that inherent in Mil. R. Evid. 413 is a general presumption in favor of admission.

Military & Veterans Law > Military Offenses > Rape & Sexual Assault

Military & Veterans
Law > ... > Evidence > Admissibility of Evidence > Sex Offenses

HN5 **Military Offenses, Rape & Sexual Assault**

Although not completed, an attempted sexual assault sexual assault in violation of Unif. Code Mil. Justice art. 120, *10 U.S.C.S. § 920*, qualifies as a "sexual offense" for purposes of Mil. R. Evid. 413(d), Manual Courts-Martial.

Military & Veterans
Law > ... > Evidence > Admissibility of Evidence > Sex Offenses

HN6 **Admissibility of Evidence, Sex Offenses**

With respect to Mil. R. Evid. 413, Manual Courts-Martial, under the United States Court of Appeals for the Armed Forces' decision in Wright, a military judge is not required to find by a preponderance that the sexual assault occurred; rather, he need only find that the court members could make such a finding.

Military & Veterans Law > ... > Courts Martial > Evidence > Relevance

HN7 **Evidence, Relevance**

Relevant evidence is evidence that has any tendency to make the existence of any fact of consequence to determining the case more probable or less probable than it would be without the evidence. Mil. R. Evid. 401, Manual Courts-Martial. Relevance is a low threshold.

Military & Veterans Law > Military Justice > Judicial Review > New Trials

HN8[] **Judicial Review, New Trials**

A servicemember may petition for a new trial on the grounds of newly discovered evidence or fraud on the court. Unif. Code Mil. Justice art. 73, *10 U.S.C.S. § 873*. A new trial shall not be granted on the grounds of newly discovered evidence unless the petition shows that: (A) the evidence was discovered after the trial; (B) the evidence is not such that it would have been discovered by the petitioner at the time of trial in the exercise of due diligence; and (C) the newly discovered evidence, if considered by a court-martial in the light of all other pertinent evidence, would probably produce a substantially more favorable result for the accused.

Military & Veterans Law > Military Justice > Judicial Review > New Trials

HN9[] **Judicial Review, New Trials**

No fraud on the court-martial warrants a new trial unless it had a substantial contributing effect on a finding of guilty or the sentence adjudged. R.C.M. 1210(f)(3), Manual Courts-Martial. Examples of fraud on a court-martial which may warrant granting a new trial include confessed or proved perjury which clearly had a substantial contributing effect on a finding of guilty and willful concealment by the prosecution from the defense of evidence favorable to the defense which would probably have resulted in a finding of not guilty. R.C.M. 1210(f)(3), Discussion.

Military & Veterans Law > Military Justice > Judicial Review > New Trials

HN10[] **Judicial Review, New Trials**

Requests for a new trial under Unif. Code Mil. Justice art. 73, *10 U.S.C.S. § 873*, are generally disfavored, and are granted only if a manifest injustice would result absent a new trial based on proffered newly discovered evidence.

Military & Veterans Law > Military Justice > Judicial Review > New Trials

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Rehearings

HN11[] **Judicial Review, New Trials**

A military judge decides a post-trial motion for a rehearing by applying the criteria for petition for a new trial set forth in Unif. Code Mil. Justice art. 73, *10 U.S.C.S. § 873*, and R.C.M. 1210(f), Manual Courts-Martial. A military court of criminal appeals reviews such rulings for an abuse of discretion. The court also reviews a military judge's selection of a remedy for an abuse of discretion.

Military & Veterans Law > Military Justice > Courts Martial > Court-Martial Member Panel

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Instructions

HN12[] **Courts Martial, Court-Martial Member Panel**

A military court of criminal appeals may presume the court members followed a military judge's instructions absent evidence to the contrary.

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

Military & Veterans Law > Military Justice > Statute of Limitations

HN13[] **Judicial Review, Standards of Review**

The statute of limitations applicable to a particular offense is a question of law, which military courts of criminal appeals review de novo.

Military & Veterans Law > Military Offenses > Rape & Sexual Assault

Military & Veterans Law > Military Justice > Statute of Limitations

HN14[] Military Offenses, Rape & Sexual Assault

Unif. Code Mil. Justice art. 43(a), 10 U.S.C.S. § 843(a), provides in part that a person charged with rape or sexual assault may be tried and punished at any time without limitation.

Governments > Legislation > Effect & Operation > Prospective Operation

Military & Veterans Law > Military Offenses > Rape & Sexual Assault

Military & Veterans Law > Military Justice > Statute of Limitations

HN15[] Effect & Operation, Prospective Operation

On 6 January 2006, the National Defense Authorization Act for Fiscal Year 2006 (NDAA) amended Unif. Code Mil. Justice art. 43(a), 10 U.S.C.S. § 843(a), to explicitly remove any temporal limitation on trial or punishment for the offense of rape, as well as murder or any other offense punishable by death. In Briggs, the United States Court of Appeals for the Armed Forces (CAAF) held that the 2006 amendment did not retroactively apply to a rape allegedly committed in 2005, which was still subject to a five-year statute of limitations. However, the CAAF has never held that a rape allegedly committed after 6 January 2006 was subject to the five-year limit.

Governments > Legislation > Interpretation

Governments > Legislation > Effect & Operation > Prospective Operation

HN16[] Legislation, Interpretation

It is a well-established principle of statutory construction that, absent a clear direction of Congress to the contrary, a law takes effect on the date of its enactment.

Military & Veterans Law > Military Justice > Disclosure & Discovery

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN17[] Military Justice, Disclosure & Discovery

A military court of criminal appeals reviews a military judge's ruling on a production request for an abuse of discretion.

Military & Veterans Law > ... > Evidence > Privileged Communications > Psychotherapist-Patient Privilege

HN18[] Privileged Communications, Psychotherapist-Patient Privilege

The Mil. R. Evid. 513(a), Manual Courts-Martial, privilege is subject to a number of specific exceptions. Mil. R. Evid. 513(d). Prior to 17 June 2015, these exceptions expressly included when the records are "constitutionally required." However, Exec. Order No. 13,696 eliminated the enumerated "constitutionally-required" exception to Mil. R. Evid. 513 as of 17 June 2015.

Military & Veterans Law > ... > Evidence > Privileged Communications > Psychotherapist-Patient Privilege

HN19[] Privileged Communications, Psychotherapist-Patient Privilege

Before ordering the production or admission of a patient's records or communications under Mil. R. Evid. 513, Manual Courts-Martial, a military judge must conduct a closed hearing at which the patient is provided a reasonable opportunity to attend and be heard. Mil. R. Evid. 513(e)(2). Prior to conducting an in camera review of Mil. R. Evid. 513 evidence, the military judge must find by a preponderance of the evidence that the moving party showed, inter alia, a specific factual basis demonstrating a reasonable likelihood that the records or communications would yield evidence admissible under an exception to the privilege. Mil. R. Evid. 513(e)(3)(A).

Military & Veterans
Law > ... > Evidence > Privileged Communications > Psychotherapist-Patient Privilege

HN20[] Privileged Communications, Psychotherapist-Patient Privilege

Mil. R. Evid. 513, Manual Courts-Martial, entitles a patient to refuse to disclose and to prevent any other person from disclosing a confidential communication made between the patient and a psychotherapist. Mil. R. Evid. 513(a). Thus the patient may elect to invoke the privilege with respect to one such confidential communication, but not another. A patient's discretion over partial disclosure of confidential communications is tempered by Mil. R. Evid. 510(a), Manual Courts-Martial, which provides that voluntary disclosure of any significant part of the matter or communication waives the privilege under such circumstances that it would thereafter be inappropriate to allow the claim of privilege.

Counsel: For Appellant: Major Rodrigo M. Caruço, USAF; Major Mark J. Schwartz, USAF.

For Appellee: Lieutenant Colonel Joseph J. Kubler, USAF; Lieutenant Colonel Brian C. Mason, USAF; Captain Peter F. Kellett, USAF; Mary Ellen Payne, Esquire.

Judges: Before J. JOHNSON, POSCH, and KEY, Appellate Military Judges. Chief Judge J. JOHNSON delivered the opinion of the court, in which Judge POSCH and Judge KEY joined.

Opinion by: J. JOHNSON

Opinion

J. JOHNSON, Chief Judge:

A general court-martial composed of officer and enlisted members convicted Appellant, contrary to his pleas, of one specification of rape and one specification of abusive sexual contact, both in violation of *Article 120, UCMJ, 10 U.S.C. § 920*.[1],[2] The court-martial sentenced Appellant to a dishonorable discharge, confinement for seven years, and reduction to the grade of E-3. The military judge granted in part a post-trial defense motion for a new trial, vacating the conviction **[*2]** for abusive sexual contact and the sentence. The convening authority subsequently dismissed the specification of abusive sexual contact. At a sentencing rehearing on the remaining conviction for rape, a different officer and enlisted panel sentenced Appellant to a dishonorable discharge, confinement for five years, and reduction to the grade of E-1. The convening authority approved a reduction only to the grade of E-3, as well as the dishonorable discharge and confinement for five years.

Appellant has raised 12 issues on appeal: (1) whether the military judge erred by denying a defense motion to exclude evidence offered pursuant to Mil. R. Evid. 413; (2) whether the military judge erred by failing to grant a new trial as to both specifications of which he was originally convicted; (3) whether, in light of *United States v. Mangahas, 77 M.J. 220, 222 (C.A.A.F. 2018)*, jurisdiction existed to prosecute the rape specification for which Appellant was convicted; (4) whether the military judge erred in admitting certain witness testimony in light of *United States v. Hills, 75 M.J. 350 (C.A.A.F. 2016)*, and *United States v. Hukill, 76 M.J. 219 (C.A.A.F. 2017)*; (5) whether the charge and specification of which Appellant was convicted were improperly preferred; (6) whether investigators violated **[*3]** Appellant's *Fourth Amendment*[3] rights when they searched his home and vehicle; (7) whether the victim's alleged perjury violated Appellant's right to a fair trial; (8) whether Appellant's trial defense counsel were ineffective for failing to challenge the charged specifications as multiplicious or to seek separate trials for each alleged offense; (9) whether Appellant was unfairly prejudiced by the admission of a 2003 performance report containing information that Appellant

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[1] The rape conviction was based on the version of *Article 120, UCMJ*, in effect in September 2006. *10 U.S.C. § 920(a)*, *Manual for Courts-Martial, United States* (2005 ed.). Unless otherwise specified, all other references to the Uniform Code of Military Justice, Rules for Courts-Martial, and Military Rules of Evidence are to the *Manual for Courts-Martial, United States* (2016 ed.).

[2] The abusive sexual contact of which Appellant was found guilty was a lesser included offense of a specification alleging aggravated sexual contact, also in violation of *Article 120, UCMJ*. The court-martial found Appellant not guilty of the charged aggravated sexual contact, as well as two specifications of rape in violation of *Article 120, UCMJ*.

[3] *U.S. Const. amend. IV*.

received nonjudicial punishment for committing assault; (10) whether there has been unreasonable delay in the appellate review of Appellant's case; (11) whether the military judge erred in denying a defense motion to compel the victim's mental health records; and (12) whether the military judge erred in failing to exclude certain witness testimony pursuant to Mil. R. Evid. 403.[4] With respect to issues (4), (5), (6), (7), (8), (9), (10), and (12), we have carefully considered Appellant's contentions and find they do not require further discussion or warrant relief. *See* *United States v. Matias, 25 M.J. 356, 361 (C.M.A. 1987)*. With respect to the remaining issues, we find no prejudicial error and we affirm the findings and the sentence.

I. Background

A. Alleged Incidents of Sexual Assault

1. MP

Appellant joined **[*4]** the Air Force in 1997. In 2001, while Appellant was stationed at Grand Forks Air Force Base (AFB), North Dakota, he married MP, with whom Appellant had a child. At Appellant's trial, MP testified regarding an incident in January 2003 when Appellant "attempt[ed] to start sexual relations" with her after she had gone to bed. When MP refused, Appellant "proceeded to sit on top" of MP and tried to force her "to perform oral sex on him." MP testified she was eventually able to push Appellant off of her. Shortly after the incident, MP reported to military authorities the attempted sexual assault and other alleged offenses Appellant committed against her that night. As a result, Appellant received nonjudicial punishment pursuant to *Article 15, UCMJ, 10 U.S.C. § 815*. After that incident, MP separated from Appellant, and they divorced in 2005.

2. SG

In 2005, while Appellant was stationed at Minot AFB, North Dakota, he met SG.[5] Appellant and SG married several months later in November 2005. According to SG's trial testimony, Appellant was initially attentive and caring toward her, but within a month of their wedding he became controlling and verbally and physically abusive. Appellant's conduct included penetrating **[*5]** SG's mouth and vagina with his penis as she slept. SG described a particular incident in September 2006 when she and a neighbor had been out drinking alcohol. When SG returned to her house, she took a shower, wrapped herself in a towel, and fell asleep on her bed. She awoke "a couple hours later" to Appellant penetrating her "rectum" with his penis. Appellant then turned SG over and penetrated her vagina with his penis. When SG "tried to crawl away," Appellant grabbed her hair and pushed her head into a pillow. SG "yelled," "tried to fight back," and "cried the whole time." According to SG, after Appellant vaginally penetrated her, he forced her to perform oral sex.

SG stayed with Appellant after this incident, although she testified the abuse continued. She described another specific incident of rape and battery that occurred around Christmas of 2006 during a trip to Minnesota. In 2007, SG moved with Appellant to Germany, where the abusive and controlling behavior continued and "got worse." She described a third specific incident of rape, forcible sodomy, and battery that occurred at their house in Germany in November 2009. In 2010, SG left Appellant in Germany and returned to the **[*6]** United States. Their divorce was finalized in 2012 or 2013.

3. SH

Appellant married SN in June 2013. In February 2016, Appellant was stationed at Joint Base Langley-Eustis, Virginia, and lived with SN in Newport News, Virginia, with their young son and with Appellant's teenage son from his marriage to MP. That month SH, a friend of SN, moved into their home after SN offered her a place to stay. In approximately March 2016, Appellant and SH engaged in consensual sex several times while SN was away on a trip for approximately ten days. In July 2016, SN learned that SH had been talking about having a sexual relationship with Appellant. Appellant and SN called the civilian police to have SH evicted. After the police informed SH that she would have to move out of the house, SH alleged that Appellant had sexually assaulted her. SH eventually alleged two instances of sexual abuse by Appellant: first, that he grabbed her

[4] Appellant personally asserts issues (3), (4), (5), (6), (7), (8), (9), (10), (11), and (12) pursuant to *United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982)*.

[5] SG is also referred to as "SO" and "SN" at various points in the record. SG was her name at the time of Appellant's trial.

hand and forced her to touch his exposed penis without her consent; and second, that on a later occasion he raped her after threatening her with a handgun. The civilian authorities did not act on these allegations, but SH also reported them to the Air Force Office of Special **[*7]** Investigations (AFOSI), which initiated an investigation.

B. Court-Martial

Appellant was ultimately tried by a general court-martial for five alleged offenses: one specification of aggravated sexual contact against SH on or about 1 April 2016; one specification of rape against SH in April 2016; and three specifications of rape against SG that occurred in North Dakota, Minnesota, and Germany in September 2006, December 2006, and November 2009, respectively. Appellant was convicted of the September 2006 rape of SG as well as a lesser-included offense of abusive sexual contact against SH for the alleged touching incident on or about 1 April 2016. He was acquitted of the greater offense of aggravated sexual contact against SH and of the other charged rapes of SH and SG.

The military judge granted a defense motion for a post-trial hearing pursuant to *Article 39(a), UCMJ, 10 U.S.C. § 839(a)*, to consider newly-discovered evidence and a defense motion for a new trial. Most notably, at the hearing the military judge received testimony from JH, SH's half-sister. JH testified, *inter alia*, to the effect that SH was vindictive, manipulative, and had made false criminal allegations before; that SH asked JH to lie to **[*8]** AFOSI investigators about when SH first informed JH of the alleged rape; and, most significantly, that SH had admitted to JH that Appellant had not forced SH to have sex. The military judge granted the defense motion for a new trial in part, specifically as to the conviction for abusive sexual contact against SH and as to the sentence.

The convening authority subsequently dismissed the specification of abusive sexual contact and convened a rehearing on the sentence as to Appellant's remaining conviction for the rape of SG in September 2006. A general court-martial composed of officer and enlisted members sentenced Appellant to a dishonorable discharge, confinement for five years, and reduction to the grade of E-1. In accordance with the advice of his staff judge advocate, the convening authority approved a reduction only to the grade of E-3, as well as the dishonorable discharge and confinement for five years.

II. Discussion

A. Mil. R. Evid. 413

1. Additional Background

Before trial, in accordance with Mil. R. Evid. 413(b) and Mil. R. Evid. 404(b), the Government provided notice to the Defense of its intent to offer the testimony of MP regarding Appellant's uncharged attempt to force her to perform oral sex in January 2003, as well as other verbal **[*9]** and physical abuse MP suffered from Appellant during their marriage. In response, the Defense filed a motion in limine to exclude this testimony. The Defense contended, *inter alia*, that the evidence was insufficiently reliable for the court-martial to find by a preponderance that the alleged acts occurred, and that the probative value of such evidence was substantially outweighed by the danger of unfair prejudice. The Government opposed the Defense's motion in limine, contending *inter alia* that MP's testimony that Appellant attempted to force her to perform oral sex was admissible evidence of propensity under Mil. R. Evid. 413 and also relevant under Mil. R. Evid. 404(b) to show Appellant's plan, intent, absence of mistake, and modus operandi with respect to charged offenses.

The military judge conducted a hearing where he received testimony from MP and SG, as well as other evidence and additional argument by counsel. The military judge found the evidence of Appellant's alleged attempted sexual assault against MP was admissible as propensity evidence under Mil. R. Evid. 413, but he rejected the use of the attempted sexual assault and other alleged verbal and physical abuse under Mil. R. Evid. 404(b). Accordingly, MP testified before the members regarding **[*10]** the January 2003 attempted sexual assault as described in the Background section above.

2. Law

HN1[↑] A military judge's decision to admit evidence is reviewed for an abuse of discretion. *United States v. Jerkins, 77 M.J. 225, 228 (C.A.A.F. 2018)* (citing *United States v. Erikson, 76 M.J. 231, 234 (C.A.A.F. 2017)*). "A military judge abuses his discretion when: (1) the findings of fact upon which he predicates his ruling are

not supported by the evidence of record; (2) if incorrect legal principles were used; or (3) if his application of the correct legal principles to the facts is clearly unreasonable." *United States v. Ellis, 68 M.J. 341, 344 (C.A.A.F. 2010)* (citing *United States v. Mackie, 66 M.J. 198, 199 (C.A.A.F. 2008))*.

HN2[↑] Mil. R. Evid. 413 provides that "[i]n a court-martial proceeding for a sexual offense, the military judge may admit evidence that the accused committed any other sexual offense. The evidence may be considered on any matter to which it is relevant." Mil. R. Evid. 413(a). "This includes using evidence of either a prior sexual assault conviction or uncharged sexual assaults to prove that an accused has a propensity to commit sexual assault." *United States v. Hills, 75 M.J. 350, 354 (C.A.A.F. 2016)* (citing *United States v. James, 63 M.J. 217, 220-22 (C.A.A.F. 2006))*.[6] For purposes of Mil. R. Evid. 413, a "sexual offense" includes, *inter alia*, "any conduct prohibited by *Article 120[, UCMJ]*," and an attempt to engage in such conduct. Mil. R. Evid. 413(d)(1), (6).

In *United States v. Wright, 53 M.J. 476, 482 (C.A.A.F. 2000)*, the United States Court of Appeals for the Armed Forces (CAAF) explained that ***HN3***[↑] military judges are required to make three threshold **[*11]** findings before admitting evidence under Mil. R. Evid. 413: (1) the accused is charged with an offense of sexual assault; (2) the evidence proffered is evidence of his commission of another offense of sexual assault; and (3) the evidence is relevant under Mil. R. Evid. 401 and Mil. R. Evid. 402. Additionally, the military judge must apply the balancing test of Mil. R. Evid. 403 to determine whether the probative value of the proffered evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or other countervailing considerations. *Id.*; *see* Mil. R. Evid. 403. ***HN4***[↑] In *Wright*, the CAAF set forth a non-exclusive list of factors to be considered under Mil. R. Evid. 403 in the context of Mil. R. Evid. 413 evidence: the strength of the proof of the prior act of sexual assault; the probative weight of the evidence; the potential for less prejudicial evidence; distraction of the factfinder; the time needed for proof of the prior conduct; the temporal proximity of the prior conduct to the charged offense(s); the frequency of the acts; the presence or absence of intervening circumstances between the prior acts and charged offenses; and the relationship between the parties involved. *53 M.J. at 482* (citations omitted). However, the CAAF has stated that "inherent in [Mil. R. Evid.] 413 is a general presumption **[*12]** in favor of admission." *United States v. Berry, 61 M.J. 91, 94-95 (C.A.A.F. 2005)* (citing *Wright, 53 M.J. at 482-83*).

3. Analysis

Appellant contends the military judge abused his discretion by admitting MP's testimony under Mil. R. Evid. 413 in two respects. He argues the evidence of the 2003 attempted sexual assault was insufficiently reliable. Appellant additionally argues the Mil. R. Evid. 403 factors articulated in *Wright* weigh against admission.

We find the military judge did not abuse his discretion. In his written ruling, the military judge appropriately applied Mil. R. Evid. 413 and *Wright* to find the three initial threshold requirements were met. *See Wright, 53 M.J. at 482*. First, Appellant was charged with multiple offenses of sexual assault in violation of *Article 120, UCMJ*.

Second, MP's proffered testimony was evidence of another, uncharged offense of sexual assault in January 2003; ***HN5***[↑] although not completed, an attempted sexual assault in violation of *Article 120, UCMJ*, qualifies as a "sexual offense." *See* Mil. R. Evid. 413(d). Appellant assails the military judge's ruling as to this requirement on the basis that "there must be at least a preponderance of the evidence that the sexual assault occurred," which he contends is lacking. We disagree. To clarify, ***HN6***[↑] under *Wright* the military judge is not required to find by a preponderance that the sexual assault **[*13]** occurred; rather, he need only find that the court members could make such a finding. *See United States v. Solomon, 72 M.J. 176, 179 (C.A.A.F. 2013)* (citing *Wright, 53 M.J. at 483*) (additional citation omitted). We find the military judge could readily reach that conclusion in this case. MP's testimony was direct evidence of the 2003 attempted sexual assault. We are not persuaded by Appellant's argument that the fact that MP reported the assault to military authorities rather than civilian authorities is somehow fatal to the credibility of MP's testimony.

Third, MP's testimony was relevant under Mil. R. Evid. 401 and 402. ***HN7***[↑] Relevant evidence is evidence that has any tendency to make the existence of any fact of consequence to determining the case more probable

[6] However, evidence of sexual offenses charged in the same case may not be used as propensity evidence under Mil. R. Evid. 413. *Hills, 75 M.J. at 356-57*.

or less probable than it would be without the evidence. Mil. R. Evid. 401. Relevance is a low threshold. *United States v. Roberts, 69 M.J. 23, 27 (C.A.A.F. 2010)*. Viewed in light of Mil. R. Evid. 413's presumption in favor of admission, we find no abuse of discretion. The military judge could reasonably find the evidence that Appellant attempted to sexually assault his then-spouse as she tried to sleep in 2003 had some logical relevance to the charged sexual offenses, particularly the rape of SG in 2006 for which Appellant was convicted. *See Berry, 61 M.J. at 95* (citation omitted); *United States v. Bailey, 55 M.J. 38, 40 (C.A.A.F. 2001)*.

Next we consider the military judge's balancing of the **[*14]** probative value of MP's testimony against any countervailing interests under Mil. R. Evid. 403, specifically in light of the factors enumerated in *Wright, 53 M.J. at 482*. The military judge analyzed these factors individually in his written ruling; accordingly, we review his ruling for a "clear abuse of discretion." *United States v. Manns, 54 M.J. 164, 166 (C.A.A.F. 2000)* (quoting *United States v. Ruppel, 49 M.J. 247, 250 (C.A.A.F. 1998))*. The military judge found the following factors favored admission: the strength of proof of the prior act (MP's testimony bolstered by a consistent sworn statement made close in time to the incident); the probative weight of the evidence (given the similarity between the uncharged sexual offense and a charged sexual offense); the unavailability of other evidence of the uncharged offense; the limited distraction to the factfinder; the limited extent of the testimony of the uncharged offense; the relative temporal proximity of the uncharged offense in 2003 to the first charged offense in 2006; and the lack of intervening circumstances. *See Wright, 53 M.J. at 482*. On the other hand, the military judge found the frequency of the uncharged acts—a single incident—and the fact that it was "not in the same manner" as the charged offenses weighed against admission. Finally, the military judge found the implications of the relationship **[*15]** of the parties to be mixed. On the one hand, the military judge noted Appellant's marriage to MP ended in divorce. Furthermore, he found evidence that MP was in communication with the alleged victims of the charged offenses, SG and SH. However, he further noted the fact that MP made an official report and sworn statement shortly after the 2003 incident, long before Appellant ever met SG or SH, mitigated concerns that MP's testimony was the product of collusion. Recognizing the presumption in favor of admitting Mil. R. Evid. 413 evidence and the deference afforded a military judge's detailed Mil. R. Evid. 403 analysis, we find the military judge did not clearly abuse his discretion by admitting MP's testimony regarding an uncharged prior sexual offense committed by Appellant.

B. Request for New Trial

1. Law

HN8[↑] A petitioner may petition for a new trial "on the grounds of newly discovered evidence or fraud on the court." *Article 73, UCMJ, 10 U.S.C. § 873*. A new trial shall not be granted on the grounds of newly discovered evidence unless the petition shows that:

> (A) The evidence was discovered after the trial;
>
> (B) The evidence is not such that it would have been discovered by the petitioner at the time of trial in the exercise of due diligence; **[*16]** and
>
> (C) The newly discovered evidence, if considered by a court-martial in the light of all other pertinent evidence, would probably produce a substantially more favorable result for the accused.

R.C.M. 1210(f)(2); *see United States v. Luke, 69 M.J. 309, 314 (C.A.A.F. 2011)*; *United States v. Johnson, 61 M.J. 195, 198 (C.A.A.F. 2005)*.

HN9[↑] "No fraud on the court-martial warrants a new trial unless it had a substantial contributing effect on a finding of guilty or the sentence adjudged." R.C.M. 1210(f)(3). Examples of fraud on a court-martial which may warrant granting a new trial include "confessed or proved perjury . . . which clearly had a substantial contributing effect on a finding of guilty" and "willful concealment by the prosecution from the defense of evidence favorable to the defense which . . . would probably have resulted in a finding of not guilty . . . ." R.C.M. 1210(f)(3), Discussion.

HN10[↑] "[R]equests for a new trial . . . are generally disfavored," and are "granted only if a manifest injustice would result absent a new trial . . . based on proffered newly discovered evidence." *United States v. Hull, 70 M.J. 145, 152 (C.A.A.F. 2011)* (quoting *United States v. Williams, 37 M.J. 352, 356 (C.M.A. 1993))*.

HN11[↑] A military judge decides a post-trial motion for a rehearing by applying the criteria for petition for a new trial set forth in *Article 73, UCMJ*, and R.C.M. 1210(f). *United States v. Williams, 37 M.J. 352, 355-56 (C.M.A.1993)*. We review such rulings for an abuse of discretion. *Id. at 356*. We also review a military judge's

selection of a remedy **[*17]** for an abuse of discretion. *United States v. Gore, 60 M.J. 178, 187 (C.A.A.F. 2004)*.

2. Analysis

After the post-trial Article 39(a) hearing, the military judge issued a written ruling granting in part the Defense's motion for a new trial, specifically with respect to the conviction for abusive sexual contact against SH and the sentence. The military judge declined to grant a new trial as to Appellant's conviction for raping SG in September 2006. The military judge explained that although the Defense had met the three criteria for a new trial with respect to abusive sexual contact, "the evidence warranting a new trial emphatically and only pertains to one specification, and that [rape] specification required separate proof and separate evidence from the affected specification."

Appellant contends the military judge abused his discretion because the specification of which Appellant was convicted was "inextricably intertwined" with the other charged offenses. He cites the military judge's acknowledgement of evidence of fraud by SH, the military judge's previous references to communication among the alleged victims, and the Government's closing argument that "linked all three women together in their theory of guilt." We are not persuaded.

First, **[*18]** the newly-discovered evidence adduced at the post-trial hearing centered on SH. Most notably, as described above, SH's half-sister JH testified that SH admitted Appellant had not forced SH to engage in sexual activity.[7] JH's testimony did indicate SH reached out to contact one of Appellant's former spouses after SH was evicted from Appellant's residence.[8] However, JH further testified that her impression was SH was inspired to make her allegations after learning about a prior allegation, and JH did not believe the former spouse "put [SH] up to it or anything like that." Thus the newly-discovered evidence did not relate to the charged offenses involving SG, other than indicating SH was aware of a prior allegation when she made her own allegations.

Furthermore, as noted above in relation to the first issue, it is clear MP's uncharged allegation of attempted sexual assault in 2003 was not a recent fabrication. MP reported the incident shortly after the event, long before any of the alleged victims were aware of one another.

In addition, SH provided no testimony regarding the September 2006 rape of SG for which Appellant was convicted. Therefore, to the extent SH's credibility was degraded **[*19]** by the newly-discovered evidence, it did not impact the sufficiency of the evidence supporting the remaining conviction.

Finally, the military judge gave the court members an appropriate "spillover" instruction regarding their deliberations on findings. The court members were instructed, *inter alia*, "Each offense must stand on its own and you must keep each offense separate. . . . [I]f you find or believe that [Appellant] is guilty of one charged offense, you may not use that finding or belief as the basis for inferring, assuming, or proving that he committed any other offense." ***HN12***[↑] We may presume the court members followed the military judge's instructions absent evidence to the contrary. *See United States v. Stewart, 71 M.J. 38, 42 (C.A.A.F. 2012)* (quoting *United States v. Taylor, 53 M.J. 195, 198 (C.A.A.F. 2000)*. Far from evidence to the contrary, the court members' mixed findings in this case suggest they carefully evaluated each specification, and did not view the Government's case as a monolith to be accepted either whole or not at all.

Accordingly, we find Appellant has failed to demonstrate the military judge abused his discretion by declining to grant a new trial with respect to Appellant's conviction for the rape of SG in September 2006.

C. Statute of Limitations

1. Law

HN13[↑] The statute of limitations **[*20]** applicable to a particular offense is a question of law, which appellate courts review de novo. *United States v. Mangahas, 77 M.J. 220, 222 (C.A.A.F. 2018)* (citing *United States v. Lopez de Victoria, 66 M.J. 67, 73 (C.A.A.F. 2008)* (additional citation omitted)).

HN14[↑] *Article 43(a), UCMJ, 10 U.S.C. § 843(a)*,

[7] Other evidence included testimony from a prosecution paralegal, testimony from Appellant's spouse SN, and a stipulation of expected testimony from SH's spouse. Taken together, this additional evidence suggested that SH sent mocking or hostile text messages to SN immediately after the trial, and then falsely denied doing so.

[8] Although JH did not identify the former spouse by name, the context and other evidence indicate it was MP.

found in the *Manual for Courts-Martial, United States* (2006 ed.), provides in pertinent part that '[a] person charged with . . . rape or sexual assault . . . may be tried and punished at any time without limitation."

2. Analysis

Appellant was convicted for committing rape against SG in September 2006. Appellant argues that, in light of *Mangahas*, "the 2006 amendment to *10 U.S.C. § 843* was not effective until 1 October 2007," and therefore the prosecution of the September 2006 rape was barred by the statute of limitations.

Prior to 6 January 2006, *Article 43(a), UCMJ*, provided that a person charged "with any offense punishable by death" was subject to trial and punishment by court-martial "at any time without limitation." *10 U.S.C. § 843(a)*, *Manual for Courts-Martial, United States* (2005 ed.) (2005 *MCM*). In *Mangahas*, the CAAF overruled its precedent in *Willenbring v. Neurauter, 48 M.J. 152, 178, 180 (C.A.A.F. 1998)*, to clarify that a rape in violation of *Article 120, UCMJ*, allegedly committed in 1997 was not "an offense punishable by death" within the meaning of the pre-2006 version of *Article 43(a), UCMJ*, because the death penalty was "simply unavailable **[*21]** for the charged offense on constitutional grounds." *77 M.J. at 224*. Therefore, the alleged 1997 rape was subject to the general five-year statute of limitation applicable to most offenses under the UCMJ. *Mangahas, 77 M.J. at 225*; *see 10 U.S.C. § 843(a) (2005 MCM)*.

However, ***HN15***[↑] on 6 January 2006, the *National Defense Authorization Act for Fiscal Year 2006 (NDAA)* amended *Article 43(a), UCMJ*, to explicitly remove any temporal limitation on trial or punishment for the offense of rape, as well as murder or "any other offense punishable by death." *Pub. L. No. 109-163, § 553, 119 Stat. 3136, 3264 (2006)*. In *United States v. Briggs, 78 M.J. 289, 293-95 (C.A.A.F. 2019)*, the CAAF held that the 2006 amendment did not retroactively apply to a rape allegedly committed in 2005, which was still subject to a five-year statute of limitations. However, the CAAF has never held that a rape allegedly committed after 6 January 2006 was subject to the five-year limit.

Appellant cites no authority for his assertion that Congress' removal of the temporal limitation on trial or punishment for the offense of rape was not effective until 1 October 2007, and we find none.[9] Congress did not specify a particular implementation date with respect to *§ 553 of the NDAA*, which is the section that removed the statute of limitations for the offense of rape. ***HN16***[↑] "It **[*22]** is a well-established principle of statutory construction that, absent a clear direction of Congress to the contrary, a law takes effect on the date of its enactment." *United States v. Christian, 63 M.J. 205, 208 (C.A.A.F. 2006)* (citations omitted). Therefore, the September 2006 rape for which Appellant was convicted was not subject to any statute of limitations, and Appellant's assignment of error is without merit.

D. Mil. R. Evid. 513

1. Additional Background

On 13 April 2018, prior to the sentencing rehearing, the Defense submitted a motion to compel production of SG's mental health records from 1 January 2006 onward for *in camera* review by the military judge.[10] The Defense attached to the motion several emails exchanged between Appellant and SG between December 2010 and February 2011 in which SG briefly referred to advice she had received from her "therapist." The Defense contended that by referencing her therapy sessions, SG had waived any psychotherapist-patient privilege regarding those communications pursuant to Mil. R. Evid. 513. Additionally, the Defense argued that *in camera* review of the records was warranted because of the likelihood that they contained information that contradicted SG's prior testimony. The Government and SG, through counsel, opposed production of **[*23]** the records for *in camera* review.

The military judge denied the defense motion. In a written ruling, he held that although the limited disclosures SG made regarding communications with her therapist "certainly . . . forfeited any privilege with

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[9] Congress did provide certain other modifications to the UCMJ implemented by the NDAA with an effective date of 1 October 2007. However, this delayed effective date applied to ***§ 552 of the NDAA***, and not to ***§ 553*** which removed the statute of limitations for rape. ***Pub. L. No. 109-163, §§ 552-53, 119 Stat. 3136, 3264 (2006)***.

[10] Portions of the record and briefs addressing this issue were sealed pursuant to Mil. R. Evid. 412(c)(2) and R.C.M. 1103A. These materials remain sealed. Any discussion of sealed material in this opinion is limited to what is necessary for our analysis.

respect to any previously confidential communications she voluntarily revealed to [Appellant]," SG "retain[ed] her [Mil. R. Evid.] 513 privilege with respect to any other communications between herself and her psychotherapist, absent any evidence indicating that the privilege does not apply." Furthermore, the military judge found the Defense failed to meet its burden to demonstrate a "specific factual basis demonstrating a reasonable likelihood" that the requested records "would yield evidence admissible under an exception to the privilege." The military judge found none of the enumerated exceptions to Mil. R. Evid. 513 applied, and that any prospect that the records would reveal SG had testified falsely at Appellant's trial "to be speculative at best and . . . d[id] not rise to the level of establishing that [Appellant] will be deprived of any constitutional right by the non-production" of the records.

2. Law

HN17[↑] We review a military judge's ruling on a production request for an abuse **[*24]** of discretion. *United States v. Stellato, 74 M.J. 473, 480 (C.A.A.F. 2015)*.

Mil. R. Evid. 513(a) provides:

> A patient has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made between the patient and a psychotherapist or an assistant to a psychotherapist, in a case arising under the [UCMJ], if such communication was made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition.

HN18[↑] The privilege is subject to a number of specific exceptions. Mil. R. Evid. 513(d). Prior to 17 June 2015, these exceptions expressly included when the records are "constitutionally required." Mil. R. Evid. 513(d)(8) as amended by Exec. Order 13,643, *78 Fed. Reg. 29,559, 29,592* (15 May 2013). However, Executive Order 13,696 eliminated the enumerated "constitutionally-required" exception to Mil. R. Evid. 513 as of 17 June 2015. Exec. Order 13,696, *80 Fed. Reg. 35,783* (17 Jun. 2015).

HN19[↑] Before ordering the production or admission of a patient's records or communications under Mil. R. Evid. 513, the military judge must conduct a closed hearing at which the patient is provided a reasonable opportunity to attend and be heard. Mil. R. Evid. 513(e)(2). Prior to conducting an in camera review of Mil. R. Evid. 513 evidence, "the military judge must find by a preponderance of the evidence that the moving party showed," *inter alia*, "a specific factual basis demonstrating **[*25]** a reasonable likelihood that the records or communications would yield evidence admissible under an exception to the privilege." Mil. R. Evid. 513(e)(3)(A).

3. Analysis

On appeal, Appellant contends the military judge abused his discretion by denying the defense motion for production, and should have at a minimum conducted an *in camera* review. We conclude otherwise.

First, we agree with the military judge that SG's brief references to advice she received from her therapist did not waive her Mil. R. Evid. 513 privilege with respect to other communications with any psychotherapist. As we explained in *United States v. Morales, No. ACM 39018, 2017 CCA LEXIS 612, at *20 (A.F. Ct. Crim. App. 13 Sep. 2017)*, *rev. denied*, *77 M.J. 310 (C.A.A.F. 2018)* (unpub. op.):

> ***HN20***[↑] Mil. R. Evid. 513 entitle[s] [the patient] "to refuse to disclose and to prevent any other person from disclosing *a confidential communication* made between the patient and a psychotherapist . . . ." Mil. R. Evid. 513(a) (emphasis added). Thus the patient may elect to invoke the privilege with respect to one such confidential communication, but not another.

A patient's discretion over partial disclosure of confidential communications is tempered by Mil. R. Evid. 510(a), which provides that voluntary disclosure of "any significant part of the matter or communication" waives the privilege "under such circumstances that it would [thereafter] **[*26]** be inappropriate to allow the claim of privilege." However, SG's passing references to her therapist's advice to be open and frank in her communications with Appellant did not disclose anything SG said to her therapist, did not suggest the presence of any information pertinent to the alleged offense or to SG's credibility, and did not implicate Mil. R. Evid. 510(a). We find no abuse of discretion in the military judge's conclusion that SG had not waived her Mil. R. Evid. 513 privilege beyond any information she specifically relayed to Appellant.

Accordingly, we next consider whether the military judge abused his discretion in finding *in camera* review of records covered by the Mil. R. Evid. 513 privilege was

not warranted. We agree with the military judge that the Defense failed to demonstrate a "specific factual basis" that the records sought would yield evidence admissible under an exception to the privilege. The Defense did not rely on any of the enumerated exceptions in Mil. R. Evid. 513(d), none of which appear to apply. Rather, the Defense argued that SG's emails indicate she "discussed the marriage with a therapist," and that "alone demonstrates that there are likely to be significant [Mil. R. Evid.] 513 records that relate specifically to SG's account of the events **[*27]** in question." The defense motion further asserted that, in light of various alleged problems with SG's credibility, "[c]ommon sense demands [the court members] know the possibility the possibility that SG's recollection of the event could not be accurate." The motion concluded, "the sought after information will be invaluable to [Appellant] in presenting a full and complete picture of the conviction at the sentencing hearing," and therefore disclosure was constitutionally required.

As the military judge observed, this is speculation at best. The Defense did not identify any *specific* statement or piece of information that it believed existed in the records sought, much less demonstrate that the disclosure of such information was constitutionally required in order for Appellant to prepare for his sentence rehearing. The courts of criminal appeals have reached various conclusions when analyzing how an accused's constitutional rights may require disclosure of communications covered by Mil. R. Evid. 513 in cases where no enumerated exception applies. *See* Morales, 2017 CCA LEXIS 612, unpub. op. at *22-28; *see also* J.M. v. Payton-O'Brien, 76 M.J. 782, 786-92 (N-M. Ct. Crim. App. 2017); LK v. Acosta, 76 M.J. 611, 615 (A. Ct. Crim. App. 2017). However, even when an enumerated "constitutionally required" exception existed in **[*28]** the previous version of Mil. R. Evid. 513, the party seeking production was still required to demonstrate a "specific factual basis" that the records sought would yield admissible evidence. *See* United States v. Chisum, 75 M.J. 943, 946 (A.F. Ct. Crim. App. 2016), *aff'd*, 77 M.J. 176 (C.A.A.F. 2018); *see also* Morales, 2017 CCA LEXIS 612, unpub. op. at *22-28 (finding no abuse of discretion in denying disclosure under Mil. R. Evid 513 where the defense failed to demonstrate specific factual basis, assuming *arguendo* a non-enumerated constitutional exception exists). Appellant has failed to make such a showing. Accordingly, we find the military judge did not abuse his discretion.

III. CONCLUSION

The approved findings and sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of Appellant occurred. *Articles 59(a)* and *66(c), UCMJ*, *10 U.S.C. §§ 859(a)*, *866(c)*. Accordingly, the findings and sentence are **AFFIRMED**.

End of Document

United States v. Piatti

United States Navy-Marine Corps Court of Criminal Appeals

January 23, 2014, Decided

NMCCA 201300316

Reporter
2014 CCA LEXIS 21 *; 2014 WL 243438

UNITED STATES OF AMERICA v. TONY L. PIATTI, CORPORAL (E-4), U.S. MARINE CORPS

Notice: THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.

Subsequent History: Review denied by *United States v. Piatti, 2014 CAAF LEXIS 777 (C.A.A.F., July 31, 2014)*

Prior History: [*1] GENERAL COURT-MARTIAL. Sentence Adjudged: 23 April 2013. Military Judge: Maj Y.J. Lee, USMCR. Convening Authority: Commanding Officer, Marine Corps Air Station, Beaufort, SC. Staff Judge Advocate's Recommendation: Maj H.J. Brezillac, USMC.

Case Summary

Overview
HOLDINGS: [1]-The conditions of appellant's inpatient stay at Fort Stewart's hospital did not amount to "physical restraint, the essential characteristic of confinement," thus entitling him to the procedural protection of R.C.M. 305, Manual Courts-Martial and credit for its violation where (1) there is no evidence that appellant's command ordered him into the psychiatric ward of the Fort Stewart hospital, or played any role whatsoever in that decision, (2) there was no evidence that the referral was an involuntary one, and (3) appellant's hospitalization was for a valid medical purpose.

Outcome
Judgment affirmed.

LexisNexis® Headnotes

Military & Veterans Law > ... > Courts Martial > Sentences > Credits

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

Military & Veterans Law > Military Justice > Apprehension & Restraint of Civilians & Military Personnel > Restrictions

HN1[] **Sentences, Credits**

An appellant is entitled to day-for-day credit for time that he spends either in pretrial confinement, or in pretrial restriction equivalent to confinement. Whether an appellant is entitled to pretrial confinement credit for restraint is an issue the Court of Criminal Appeals reviews de novo. An appellant subjected to the physical restraint attendant to pretrial confinement may be entitled to additional credit for violation of the procedural requirements of R.C.M. 305, Manual Courts-Martial.

Counsel: For Appellant: Maj John J. Stephens, USMC.

For Appellee: Maj Paul M. Ervasti, USMC; Capt Matthew M. Harris, USMC.

Judges: Before M.D. MODZELEWSKI, F.D. MITCHELL, J.A. FISCHER, Appellate Military Judges.

Opinion

OPINION OF THE COURT

PER CURIAM:

A military judge sitting as a general court-martial convicted the appellant, pursuant to his pleas, of abusive sexual contact with a child and obstructing justice, in violation of Articles 120(i) and 134, Uniform

Code of Military Justice, *10 U.S.C. §§ 920(i)* and *934*. The military judge imposed a sentence of three years confinement, reduction to pay grade E-1, and a dishonorable discharge. Pursuant to a pretrial agreement, the convening authority approved the adjudged sentence, but suspended confinement in excess of 24 months.

The appellant alleges that the military judge erred in refusing to give him day-for-day pretrial confinement (PTC) credit and additional administrative credit for the period during which he was confined to a **[*2]** military hospital for psychiatric evaluation and treatment. After thoroughly examining the record of trial and the pleadings of the parties, we conclude that the findings and the sentence are correct in law and fact, and that no error materially prejudicial to the substantial rights of the appellant occurred. *Arts. 59(a)* and *66(c), UCMJ*.

Factual Background

While pending trial by general court-martial, the appellant was placed under a military protective order (MPO) following a domestic dispute with his wife. Following a violation of the MPO, the appellant was placed in the psychiatric ward of a military hospital for twelve days and then confined to a brig for sixty-three days prior to his court-martial. At trial, the defense counsel sought day-for-day PTC credit for all 75 days, while the trial counsel argued that the appellant was entitled to credit only for the sixty-three days spent in the brig. The only evidence presented on the motion was the testimony of the appellant, from which the following narrative largely derives.

On the evening of 6 February 2013, the appellant visited his wife at their off-base residence in Beaufort, South Carolina, in violation of the MPO. The visit escalated **[*3]** into a conflict, during which the appellant broke a beer bottle and threatened to damage her vehicle. When he suspected that his wife may call authorities, the appellant ran into nearby woods and ascended a 60 foot tree. He remained there overnight, securing his position on the tree with his shoelaces. The following day, a member of his command found the appellant around 1200 or 1300. After the Beaufort Fire Department retrieved the appellant from the tree with a ladder, civilian authorities handcuffed him, and turned him over at the scene to personnel from the base Provost Marshal's Office (PMO). Although the local authorities un-cuffed the appellant upon turnover, the military authorities promptly handcuffed him again before transporting him to the naval hospital at Marine Corps Air Station (MCAS) Beaufort.

At the hospital, medical personnel evaluated the appellant, evidently to ensure that he was not suffering from hypothermia from his night outdoors. While at the hospital, the appellant overheard conversations between his command representative and PMO personnel indicating that he would shortly be placed in the brig for violating the MPO. However, during his evaluation at the naval **[*4]** hospital, the decision was made that the appellant should receive a psychiatric evaluation. The only evidence of record as to how that decision was made is the testimony of the appellant: "Later on, while at the hospital, they had me talk to a . . . psychologist to the best of my knowledge, and she recommended that I go to a hospital prior to going to the Brig." Record at 259.

Later that evening, the appellant was transported by ambulance, unrestrained, to the psychiatric ward at the Army hospital onboard Fort Stewart, Georgia. There, he appears to have been subject to the same level of restraint as other patients. The doors to the ward were locked, and he left only to go to the chow hall or the gym, both under supervision. He remained at that facility from 7 February 2013 until 19 February 2013. On that date, a command representative arrived to drive him back to MCAS Beaufort. When the appellant asked whether he was going to the brig, the command representative told him that the commanding officer (CO) was "over at legal determining that." *Id.* at 271. Later that day, the CO informed the appellant that he would be taken to the brig, and he was presented with a confinement order. *Id.* **[*5]** After an overnight stay in the PMO's detention cell, the appellant was taken to the Naval Consolidated Brig, where he stayed confined until his trial.

On 9 February 2013, while his client was hospitalized at Fort Stewart, the trial defense counsel requested a RULE FOR COURTS-MARTIAL 706, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.) board, noting that he had learned that his client "had undergone a mental breakdown . . . made suicidal ideations, undertook an unauthorized absence, and was later found by emergency personnel in a tree." Appellate Exhibit XXXVII at 147. The record indicates that the evaluation was not performed at Fort Stewart, but instead was completed at the Parris Island Branch Health Clinic, Naval Hospital Beaufort, on 20 February 2013, after the appellant was returned to his command and prior to transport to the Naval Consolidated Brig. AE XXXIV.

At trial, the military judge denied the defense counsel's motion for twelve days of PTC credit for the period spent at Fort Stewart, ruling that PTC began on 19 February 2013, when the command ordered the appellant placed in pretrial confinement. Record at 273.

Discussion

On appeal, the appellant seeks not only day-for-day **[*6]** credit for the time spent at Fort Stewart, but also additional credit for violation of the requirements of R.C.M. 305, which he argues were triggered by his "confinement" at the psychiatric ward.

HN1[↑] An appellant is entitled to day-for-day credit for time that he spends either in pretrial confinement, or in pretrial restriction equivalent to confinement. *United States v. Mason, 19 M.J. 274 (C.M.A. 1985)* (summary disposition). Whether an appellant is entitled to pretrial confinement credit for restraint is an issue we review *de novo.* United States v. Rendon, 58 M.J. 221, 224 (C.A.A.F. 2003) (citing United States v. Smith, 56 M.J. 290 (C.A.A.F 2002)). An appellant subjected to "the physical restraint attendant to pretrial confinement" may be entitled to additional credit for violation of the procedural requirements of R.C.M. 305. *Id. at 224*.

This case differs from those cited and relied upon by the defense in several fundamental facts. First, there is no evidence before us in the record that the appellant's command ordered him into the psychiatric ward of the Fort Stewart hospital, or played any role whatsoever in that decision. *Cf.* United States v. Regan, 62 M.J. 299 (C.A.A.F. 2006) (trial **[*7]** judge awarded *Mason* credit for days in a drug treatment program where command gave the appellant a choice to enter the program or enter confinement). The only evidence of record, provided by the appellant himself, is that a health provider at Naval Hospital Beaufort suggested that a psychiatric evaluation would be necessary or helpful, and that he was transported by ambulance from one hospital to the other.

Second, there is no evidence that the referral was an involuntary one. Although he testified under direct examination that he did not feel free to leave the secure psychiatric ward, the appellant did not testify that his admission for treatment was itself involuntary. An involuntary admission for in-patient psychiatric care within the military triggers a host of notifications, procedural protections, and requirements for documentation: this record lacks any indicia that the appellant's admission to Fort Stewart for psychiatric care was involuntary within the meaning of controlling instructions.[1]

Moreover, the record indicates that the appellant's hospitalization was for a valid medical purpose. The appellant had been facing court-martial charges for many months. When he engaged in unusual and reckless behavior, he was admitted to a psychiatric ward upon recommendation of a mental health professional. There, he appears to have been treated as all other patients were treated. In his testimony, the appellant indicated no way in which his restraint or conditions differed from those of any other patient.

In determining whether the appellant's stay at the Fort Stewart hospital for psychiatric evaluation was restraint tantamount to confinement, we look to the circumstances of his admission and stay and conclude that he was not in restraint tantamount to confinement. *Cf.* Regan, 62 M.J. at 301. Additionally, we note that the appellant would not be entitled to administrative credit for violations of R.C.M. 305 even if the trial judge or this court awarded *Mason* credit. The conditions of the appellant's inpatient stay at Fort Stewart's hospital did not amount to "physical restraint, the essential characteristic of confinement," thus entitling him to the procedural protection **[*9]** of R.C.M. 305 and credit for its violation. *Rendon, 58 M.J. at 224*; *see also* Regan, 62 M.J. at 302.

Conclusion

Accordingly, the findings and the sentence, as approved by the convening authority, are affirmed.

End of Document

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[1] *See* Department of Defense Instruction 6490.4, "Requirements for Mental Health Evaluations of Members of the Armed Forces," August 28, 1997; Secretary of the Navy Instruction 6320.24A (16 Feb 1999). **[*8]**

United States v. Snyder

United States Air Force Court of Criminal Appeals

April 15, 2020, Decided

No. ACM 39470

Reporter
2020 CCA LEXIS 117 *

UNITED STATES, Appellee v. Brandon L. SNYDER, Major (O-4), U.S. Air Force, Appellant

Notice: NOT FOR PUBLICATION

Subsequent History: Review granted by *United States v. Snyder, 2020 CAAF LEXIS 727 (C.A.A.F., July 29, 2020)*

Motion granted by *United States v. Snyder, 80 M.J. 300, 2020 CAAF LEXIS 408, 2020 WL 5352190 (C.A.A.F., Aug. 4, 2020)*

Motion granted by *United States v. Snyder, 80 M.J. 316, 2020 CAAF LEXIS 471, 2020 WL 5352102 (C.A.A.F., Aug. 24, 2020)*

Motion denied by *United States v. Snyder, 80 M.J. 344, 2020 CAAF LEXIS 515, 2020 WL 5941773 (C.A.A.F., Sept. 21, 2020)*

Review denied by *United States v. Snyder, 2020 CAAF LEXIS 628, 2020 WL 7060894 (C.A.A.F., Nov. 13, 2020)*

Prior History: [*1] Appeal from the United States Air Force Trial Judiciary. Military Judge: J. Wesley Moore (arraignment); Vance H. Spath. Approved sentence: Dismissal, confinement for 6 months, forfeiture of $1,000.00 pay per month for 6 months, and a reprimand. Sentence adjudged 11 January 2018 by GCM convened at Patrick Air Force Base, Florida.

Case Summary

Overview

HOLDINGS: [1]-A rational factfinder could have found appellant guilty beyond a reasonable doubt of all the elements of sexual assault as charged. After weighing all the evidence in the record of trial and having made allowances for not having personally observed the witnesses, the court was convinced of his guilt beyond a reasonable doubt, and therefore, his conviction of one specification of sexual assault in violation of Unif. Code Mil. Justice art. 120, *10 U.S.C.S. § 920*, was both legally and factually sufficient; [2]-The military judge did not abuse his discretion when he denied the Defense's motion for a continuance; [3]-Among numerous other matters, appellant's public trial challenge to Mil. R. Evid. 412, Manual Courts-Martial (2016 ed.), was waived, and the court determined to leave the waiver intact; [4]-No error materially prejudicial to appellant's substantial rights occurred.

Outcome

The findings and the sentence were affirmed.

LexisNexis® Headnotes

Evidence > Inferences & Presumptions > Inferences

Military & Veterans Law > Military Offenses > Rape & Sexual Assault

HN1[] **Inferences & Presumptions, Inferences**

Sexual assault by bodily harm in violation of Unif. Code Mil. Justice art. 120(b)(1)(B), *10 U.S.C.S. § 920(b)(1)(B)*, required the Government to prove four elements beyond a reasonable doubt: (1) that appellant committed a sexual act upon SB by penetrating her vulva with his finger; (2) that appellant did so by causing bodily harm to SB, to wit: penetrating her vulva with his finger; (3) that appellant did so with an intent to gratify his sexual desire; and (4) that appellant did so without the consent of SB. Manual Courts-Martial pt. IV, para. 45.b.(4)(b) (2016 ed.). "Bodily harm" means any offensive touching of another, however slight, including any nonconsensual sexual act. Unif. Code Mil. Justice art. 120(g)(3), *10 U.S.C.S. § 920(g)(3)*. With regard to consent, the statute provides, "Consent" means a freely given agreement to the conduct at issue by a competent

person. Unif. Code Mil. Justice art. 120(g)(8)(A), *10 U.S.C.S. § 920(g)(8)(A)*. Lack of consent may be inferred based on the circumstances of the offense. All the surrounding circumstances are to be considered in determining whether a person gave consent, or whether a person did not resist or ceased to resist only because of another person's actions. Unif. Code Mil. Justice art. 120(g)(8)(C), *10 U.S.C.S. § 920(g)(8)(C)*.

Criminal Law & Procedure > ... > Acts & Mental States > Mens Rea > General Intent

Military & Veterans Law > Military Offenses > Rape & Sexual Assault

HN2 **Mens Rea, General Intent**

Congress clearly intended a general intent mens rea for Unif. Code Mil. Justice art. 120(b)(1)(B), *10 U.S.C.S. § 920(b)(1)(B)*.

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

HN3 **Judicial Review, Courts of Criminal Appeals**

A court of criminal appeals may affirm only such findings of guilty as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. Unif. Code Mil. Justice art. 66(c), *10 U.S.C.S. § 866(c)*. Article 66(c) requires the Courts of Criminal Appeals to conduct a de novo review of legal and factual sufficiency of the case. The court's assessment is limited to the evidence produced at trial.

Military & Veterans Law > ... > Courts Martial > Evidence > Weight & Sufficiency of Evidence

HN4 **Evidence, Weight & Sufficiency of Evidence**

The test for legal sufficiency is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. The term reasonable doubt, however, does not mean that the evidence must be free from conflict. In resolving questions of legal sufficiency, the court is bound to draw every reasonable inference from the evidence of record in favor of the prosecution.

Military & Veterans Law > ... > Courts Martial > Evidence > Weight & Sufficiency of Evidence

HN5 **Evidence, Weight & Sufficiency of Evidence**

The test for factual sufficiency is whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, the court is itself convinced of the appellant's guilt beyond a reasonable doubt. In conducting this unique appellate role, the court takes a fresh, impartial look at the evidence, applying neither a presumption of innocence nor a presumption of guilt to make its own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt.

Military & Veterans Law > ... > Courts Martial > Evidence > Weight & Sufficiency of Evidence

HN6 **Evidence, Weight & Sufficiency of Evidence**

The "record" refers to matters introduced at trial. Matters outside the record may not be considered for factual or legal sufficiency on appeal.

Military & Veterans Law > Military Offenses > Rape & Sexual Assault

Military & Veterans Law > Military Justice > Defenses

HN7 **Military Offenses, Rape & Sexual Assault**

Mistake of fact as to consent is a defense to sexual assault. R.C.M. 916(j)(1), Manual Courts-Martial (2016 ed.). It requires that an appellant, due to ignorance or mistake, incorrectly believed that another consented to the sexual conduct. R.C.M. 916(j)(1). To be a viable defense, the mistake of fact must have been honest and reasonable under all the circumstances. R.C.M. 916(j)(1).

Constitutional Law > ... > Fundamental Rights > Criminal Process > Assistance of Counsel

Criminal Law & Procedure > Trials > Continuances

Military & Veterans Law > ... > Courts Martial > Motions > Continuances

HN8 **Criminal Process, Assistance of Counsel**

An accused has a *Sixth Amendment* right to counsel of choice. If an appellant has been erroneously deprived of this right, then the violation is not subject to harmless-error analysis. A trial court nonetheless has wide latitude in balancing the right to counsel of choice against the needs of fairness and against the demands of its calendar. The United States Supreme Court has observed: Trial judges necessarily require a great deal of latitude in scheduling trials. Not the least of their problems is that of assembling the witnesses, lawyers, and jurors at the same place at the same time, and this burden counsels against continuances except for compelling reasons. Consequently, broad discretion must be granted trial courts on matters of continuances; only an unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay violates the right to the assistance of counsel.

Military & Veterans Law > ... > Courts Martial > Motions > Continuances

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN9 **Motions, Continuances**

The court reviews a military judge's denial of a request for a continuance to be represented by civilian counsel of choice for an abuse of discretion. In determining whether the military judge abused his discretion, the court considers the factors articulated in Miller. The factors include: surprise, nature of any evidence involved, timeliness of the request, substitute testimony or evidence, availability of witness or evidence requested, length of continuance, prejudice to opponent, moving party received prior continuances, good faith of moving party, use of reasonable diligence by moving party, possible impact on verdict, and prior notice.

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN10 **Judicial Review, Standards of Review**

An abuse of discretion requires more than just a reviewing court's disagreement with the military judge's decision. An abuse of discretion occurs when the military judge's findings of fact are clearly erroneous, when an erroneous view of the law influenced his decision, or when his decision is outside the range of choices reasonably arising from the applicable facts and the law. The challenged decision must be arbitrary, fanciful, clearly unreasonable, or clearly erroneous.

Military & Veterans Law > ... > Courts Martial > Motions > Continuances

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN11 **Motions, Continuances**

Miller examines a number of factors useful in determining whether a judge has abused his discretion. This court, too, considers the application of those factors bearing in mind that there are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process.

Military & Veterans Law > ... > Courts Martial > Motions > Continuances

HN12 **Motions, Continuances**

The military judge has "wide latitude" to balance the right to counsel against the court's calendar.

Military & Veterans Law > ... > Evidence > Admissibility of Evidence > Sex Offenses

HN13 **Admissibility of Evidence, Sex Offenses**

Mil. R. Evid. 412(c)(2), Manual Courts-Martial (2016 ed.), provides that before admitting evidence under this rule, the military judge must conduct a hearing, which shall be closed.

Military & Veterans Law > Military Justice > Courts Martial > Sessions

HN14 **Courts Martial, Sessions**

It is the military judge, not a court of criminal appeals, that makes case-specific findings on the record justifying closure. R.C.M. 806(b)(5), Manual Courts-Martial (2016 ed.).

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Public Trial

Military & Veterans Law > Military Justice > Courts Martial > Trial Procedures

HN15 **Defendant's Rights, Right to Public Trial**

Failure to object to closing of courtroom is waiver of right to public trial.

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

HN16 **Judicial Review, Courts of Criminal Appeals**

Courts of criminal appeals are required to assess the entire record to determine whether to leave an accused's waiver intact, or to correct the error.

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Instructions

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN17 **Trial Procedures, Instructions**

Whether an appellant has waived an objection to a findings instruction is a legal question that this court reviews de novo. The U.S. Court of Appeals for the Armed Forces in Davis repeated what the court has previously explained is the significance of waiver, as opposed to forfeiture: Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right. Consequently, while the court reviews forfeited issues for plain error, the court cannot review waived issues at all because a valid waiver leaves no error for the court to correct on appeal.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Right to Confrontation

Military & Veterans Law > ... > Courts Martial > Sentences > Presentencing Proceedings

Military & Veterans Law > Military Justice > Courts Martial > Sentences

HN18 **Criminal Process, Right to Confrontation**

The *Sixth Amendment* right of confrontation does not apply to the presentencing portion of a non-capital court-martial. In McDonald, a three-judge majority noted that Congress would not be disabled from changing the sentencing procedures in the military. Judge Sullivan, concurring in the result, agreed with the majority that the *Sixth Amendment* does not require an adversarial sentencing proceeding with a right of confrontation. In 2013, Congress revised presentencing procedures by enacting Unif. Code Mil. Justice (UCMJ) art. 6b(a)(4)(B), *10 U.S.C.S. § 806b(a)(4)(B)*, to give a crime victim the right to be reasonably heard. In a 2015 amendment to the Manual for Courts-Martial, R.C.M. 1001A, Manual Courts-Martial, was added to implement art. 6b(a)(4)(B), UCMJ, and to allow a victim to make an unsworn statement that is not subject to cross-examination, though either party may "rebut any statements of facts therein." R.C.M. 1001A(e), Manual Courts-Martial.

Military & Veterans Law > ... > Courts Martial > Sentences > Presentencing Proceedings

HN19 **Sentences, Presentencing Proceedings**

The U.S. Court of Appeals for the Armed Forces has held that the consequences of sex offender registration are not a proper consideration for sentencing. Talkington addressed a military judge's instruction regarding an appellant's unsworn statement and observed that the proper focus of sentencing is on the offense and the character of the accused, and to prevent the waters of the military sentencing process from being muddied by an unending catalogue of administrative information. Although an appellant may reference sex offender registration in his unsworn

statement, the court finds no authority for the proposition that an appellant has an unfettered right to attach anything he wants to an unsworn statement and then have it marked as an exhibit and admitted into evidence, or otherwise presented to the factfinder, to determine an appropriate sentence.

Military & Veterans Law > ... > Courts Martial > Sentences > Presentencing Proceedings

HN20 **Sentences, Presentencing Proceedings**

The plain language of R.C.M. 1001(c)(2)(C), Manual Courts-Martial (2016 ed.) allows for an unsworn statement given "by the accused," his counsel, or both.

Military & Veterans Law > ... > Courts Martial > Sentences > Presentencing Proceedings

HN21 **Sentences, Presentencing Proceedings**

While an appellant's right of allocution in presentencing may be very broad, a military judge may provide instructions to the members to limit his statements and place them in their proper context. In Talkington, the U.S. Court of Appeals for the Armed Forces held that sex offender registration is a collateral consequence of the conviction alone and has no causal relationship to the sentence imposed for the offense. Thus, while an accused is permitted to raise this collateral consequence in his unsworn statement, the military judge may instruct the members essentially to disregard the collateral consequence in arriving at an appropriate sentence for an accused.

Military & Veterans Law > ... > Courts Martial > Sentences > Presentencing Proceedings

HN22 **Sentences, Presentencing Proceedings**

Talkington holds that the military judge is authorized to place sex offender registration in its proper context by informing the members that it is permissible for an accused to address sex offender registration in an unsworn statement, while also informing them that possible collateral consequences of a conviction should play no part in their deliberations.

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Instructions

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN23 **Trial Procedures, Instructions**

Whether an appellant has waived an objection to an instruction is a legal question that this court reviews de novo.

Military & Veterans Law > Military Offenses > Rape & Sexual Assault

Military & Veterans Law > Military Justice > Courts Martial > Sentences

HN24 **Military Offenses, Rape & Sexual Assault**

In Chapman, the U.S. Supreme Court observed that a statutory sentencing scheme that eschewed "individual degrees of culpability. would clearly be constitutional." The Supreme Court noted a statute that imposed a fixed sentence for distributing any quantity of lysergic acid diethylamide (LSD), in any form, with any carrier, would be constitutional. It follows that Congress has the power to require a minimum sentence for sexual assault as it does a fixed sentence for LSD. It also follows that whether Congress commanded a minimum sentence for an unrelated offense (e.g. homicide or assault) has no bearing on the constitutionality of a minimum sentence of a punitive discharge for sexual assault.

Criminal Law & Procedure > Sentencing > Imposition of Sentence

HN25 **Sentencing, Imposition of Sentence**

The U.S. Supreme Court explained that a sentencing scheme providing for individualized sentences rests not on constitutional commands, but on public policy enacted into statutes. Congress has the power to define criminal punishments without giving the courts any sentencing discretion, and in fact, determinate sentences were found in this country's penal codes from its inception. Although mandatory minimum sentencing schemes fail to account for the unique circumstances of offenders who warrant a lesser penalty, the Supreme Court has nonetheless held them constitutional.

Military & Veterans Law > Military Justice > Courts Martial > Sentences

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN26 **Courts Martial, Sentences**

The court reviews issues of sentence appropriateness de novo. The court's authority to determine sentence appropriateness reflects the unique history and attributes of the military justice system, and includes but is not limited to considerations of uniformity and evenhandedness of sentencing decisions. The court may affirm only as much of the sentence as it finds correct in law and fact and determines should be approved on the basis of the entire record. Unif. Code Mil. Justice art. 66(c), *10 U.S.C.S. § 866(c)*. Although the court has great discretion to determine whether a sentence is appropriate, it has no power to grant mercy.

Military & Veterans Law > ... > Courts Martial > Judges > Challenges to Judges

HN27 **Judges, Challenges to Judges**

An accused has a constitutional right to an impartial judge. R.C.M. 902, Manual Courts-Martial (2016 ed.), outlines the circumstances when a military judge shall disqualify himself or herself in any proceeding. Two distinct grounds include when the military judge's impartiality might reasonably be questioned, or the military judge has an interest, financial or otherwise, that could be substantially affected by the outcome of the proceeding. R.C.M. 902(a), (b)(5)(B), Manual Courts-Martial (2016 ed.). "Proceeding" includes pretrial, trial, post-trial, appellate review, or other stages of litigation. R.C.M. 902(c)(1), Manual Courts-Martial (2016 ed.).

Military & Veterans Law > ... > Courts Martial > Judges > Challenges to Judges

HN28 **Judges, Challenges to Judges**

When an appellant challenges a military judge's impartiality for the first time after trial, the test is whether, taken as a whole in the context of this trial, a court-martial's legality, fairness, and impartiality were put into doubt' by the military judge's actions. The appearance of impartiality is reviewed on appeal objectively and the military judge's conduct is tested to determine if it would lead a reasonable person knowing all the circumstances to the conclusion that the judge's impartiality might reasonably be questioned. Whether the military judge should disqualify herself is viewed objectively, and is assessed not in the mind of the military judge herself, but rather in the mind of a reasonable man who has knowledge of all the facts.

Military & Veterans Law > ... > Courts Martial > Judges > Challenges to Judges

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN29 **Judges, Challenges to Judges**

When the issue of disqualification is raised for the first time on appeal, the court applies the plain error standard of review. Plain error occurs when (1) there is error, (2) the error is plain or obvious, and (3) the error results in material prejudice.

Military & Veterans Law > Military Justice > Courts Martial > Judges

HN30 **Courts Martial, Judges**

Air Force Manual 51-204, United States Air Force Judiciary and Air Force Trial Judiciary, para. 1.3 (18 Jan. 2008, Incorporating Through Change 2, 9 Oct. 2014) provides that the duties of the chief trial judge include "detailing judges to all Air Force General and Special courts-martial."

Military & Veterans Law > Military Justice > Courts Martial > Judges

HN31 **Courts Martial, Judges**

There is a strong presumption that a judge is impartial, and a party seeking to demonstrate bias must overcome a high hurdle, particularly when the alleged bias involves actions taken in conjunction with judicial proceedings.

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Actions by Convening Authority

Military & Veterans Law > Military Justice > Judicial Review > Clemency & Parole

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN32[] Posttrial Procedure, Actions by Convening Authority

The standard of review for determining whether post-trial processing was properly completed is de novo. An error in post-trial processing results in material prejudice to the substantial rights of an appellant under Unif. Code Mil. Justice art. 59(a), 10 U.S.C.S. § 859(a), if an appellant makes some colorable showing of possible prejudice. Given the U.S. Court of Appeals for the Armed Forces' reliance on the highly discretionary nature of the convening authority's clemency power, the threshold for showing prejudice is low.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Assistance of Counsel

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

HN33[] Criminal Process, Assistance of Counsel

The Sixth Amendment guarantees an accused the right to effective assistance of counsel. In assessing the effectiveness of counsel, the court applies the standard set forth in Strickland, and begins with the presumption of competence announced in Cronic.

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

HN34[] Counsel, Effective Assistance of Counsel

The court reviews allegations of ineffective assistance of counsel de novo. To prevail on an ineffective assistance claim, the appellant bears the burden of proving that the performance of defense counsel was deficient and that this deficiency resulted in prejudice. Accordingly, the court considers whether counsel's performance fell below an objective standard of reasonableness. An appellate court must evaluate the combined efforts of the defense as a team rather than evaluating the individual shortcomings of any single counsel.

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Staff Judge Advocate Recommendations

HN35[] Posttrial Procedure, Staff Judge Advocate Recommendations

R.C.M. 1106(f)(2), Manual Courts-Martial (2016 ed.), lists the order of precedence on whom the staff judge advocate's recommendation (SJAR) is served if an accused fails to designate a specific counsel at trial. The SJAR is served on one counsel only, and civilian counsel is first in the order of precedence if an accused does not so designate.

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Actions by Convening Authority

HN36[] Posttrial Procedure, Actions by Convening Authority

The convening authority must only include credit for illegal pretrial confinement in the action. R.C.M. 1107(f)(4)(F), Manual Courts-Martial (2016 ed.).

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Postconviction Proceedings

HN37[] Effective Assistance of Counsel, Postconviction Proceedings

The court evaluates trial defense counsel's performance not by the success of their strategy, but by an objective standard of reasonableness.

Military & Veterans Law > Military Justice > Judicial Review

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

Military & Veterans Law > Military Justice > Courts Martial > Posttrial Procedure

HN38[] **Military Justice, Judicial Review**

The court reviews de novo whether an appellant has been denied the due process right to a speedy post-trial review and appeal. A presumption of unreasonable delay arises when appellate review is not completed and a decision is not rendered within 18 months of the case being docketed. When a case is not completed within 18 months, such a delay is presumptively unreasonable and triggers an analysis of the four factors laid out in Barker: (1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to timely review and appeal; and (4) prejudice.

Counsel: For Appellant: Major Benjamin H. DeYoung, USAF; Major Jarett F. Merk, USAF; Donald G. Rehkopf, Jr., Esquire.

For Appellee: Lieutenant Colonel Joseph J. Kubler, USAF; Lieutenant Colonel G. Matt Osborn, USAF; Major Zachary T. West, USAF; Captain Peter F. Kellett, USAF; Mary Ellen Payne, Esquire.

Judges: Before MINK, LEWIS, and POSCH, Appellate Military Judges. Judge POSCH delivered the opinion of the court, in which Senior Judge MINK and Judge LEWIS joined.

Opinion by: POSCH

Opinion

POSCH, Judge:

A general court-martial composed of officer members convicted Appellant, contrary to his pleas, of one specification of sexual assault in violation of *Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920*.[1] The conviction concerns Appellant's sexual act upon SB, a female friend of a coworker's daughter.[2] Appellant was sentenced to a dismissal, confinement for six months, forfeiture of $1,000.00 pay per **[*2]** month for six months, and a reprimand. The convening authority approved the sentence as adjudged.

Appellant raises 22 issues on appeal and we consider one additional issue. This opinion addresses 13 assignments of error, nine issues that Appellant personally raises combined as one assignment of error,[3] and one additional issue raised by the court: (1) whether the evidence is legally and factually sufficient to support the conviction; (2) whether the Specification of the Charge fails to state an offense because it fails to allege any *mens rea* element; (3) whether Appellant was denied the right to be represented at trial by retained civilian counsel of choice in violation of the *Sixth Amendment*;[4] (4) whether Appellant was denied the *Sixth Amendment* right to a public trial; (5) whether the reasonable doubt instruction the military judge gave was constitutionally defective; (6) whether Appellant was denied the *Sixth Amendment* right to confront SB after she read an unsworn victim impact statement in presentencing; (7) whether the military judge abused his discretion in precluding Appellant from including attachments to his written unsworn statement in violation of Rule for Courts-Martial (R.C.M.) 1001(c)(1)(B); (8) whether Appellant was deprived **[*3]** of due process and equal protection under the law in violation of the *Fifth Amendment*[5] because the military judge excluded attachments to his unsworn statement, and yet SB could discuss the collateral consequences of Appellant's conviction in her unsworn statement; (9) whether the military judge abused his discretion when he instructed the members to disregard the

[1] All references in this opinion to the Uniform Code of Military Justice (UCMJ), Rules for Courts-Martial (R.C.M.), and Military Rules of Evidence are to the *Manual for Courts-Martial, United States* (2016 ed.).

[2] Appellant's sole charge consisted of two specifications in which he pleaded not guilty to both specifications, and was acquitted of the second specification of abusive sexual contact of SB in violation of *Article 120, UCMJ, 10 U.S.C. § 920*.

[3] Appellant's counsel raised 13 assignments of error on 23 July 2019, and the Government answered on 5 September 2019. On 10 October 2019, pursuant to *United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982)*, Appellant identified nine issues alleging he received ineffective assistance by Major MR and Captain (Capt) JK who represented Appellant at trial, and by Capt JK who represented Appellant in his post-trial clemency submission.

[4] *U.S. Const. amend. VI*.

[5] *U.S. Const. amend. V*.

consequences to Appellant of sex offender registration; (10) whether Appellant's sentence to a mandatory dismissal is unconstitutional; (11) whether Appellant's sentence is inappropriately severe; (12) whether the military judge's undisclosed employment negotiations created a disqualifying appearance of bias; (13) whether Appellant was denied the right to procedural due process in the post-trial processing of his case; and (14) whether Appellant was denied effective assistance of counsel under the *Sixth Amendment* as alleged in nine deficiencies in the performance of his trial defense counsel.[6] In addition, we consider the issue of timely appellate review.

We find Appellant's conviction both legally and factually sufficient, and no error materially prejudicial to the substantial rights of Appellant occurred. We thus affirm.

I. Background

Appellant first met **[*4]** 18-year-old SB, a female friend of a coworker's daughter, when she was introduced to Appellant at his workplace on Patrick Air Force Base (AFB), Florida. The visit and introduction occurred during the workweek before Father's Day weekend in 2016. On Sunday evening, while visiting the coworker's family as a guest in their home, Appellant digitally penetrated SB's vulva with his finger as SB lay down in a bedroom she shared with her best friend, FK. Appellant was convicted on the basis of SB's testimony, the testimony given by FK, FK's parents, and SB's mother, and by evidence uncovered in the investigation when SB reported the incident to civilian and military authorities.

Appellant was tried on 11-12 July 2017 and 8-11 January 2018 at Patrick AFB. On the eve of trial reconvening in January with Judge Spath presiding, Appellant, through two detailed military trial defense counsel, moved for a continuance so Appellant could be represented by a civilian defense counsel (CDC), Mr. Donald G. Rehkopf, Jr., Esquire, in addition to military counsel. Judge Spath denied the continuance. After trial, the CDC prepared a brief in accordance with *Article 38(c), UCMJ, 10 U.S.C. § 838(c)*, which he intended for the convening **[*5]** authority's consideration before the convening authority took action on Appellant's case. However, the CDC submitted the brief to the convening authority's legal staff after action had been taken, and the convening authority did not recall the action to consider the brief.

In this appeal, Appellant claims structural error in Judge Spath's denial of Appellant's request for a continuance to be represented by the CDC, and alleges Judge Spath was disqualified from presiding at trial on grounds that his post-retirement employment negotiations created an appearance of bias. Appellant also claims prejudice from the convening authority's failure to recall the action to consider the CDC's *Article 38(c), UCMJ*, brief. We consider these allegations of error among the other aforementioned errors Appellant assigns for review, and begin with Appellant's contention that his conviction is legally and factually insufficient.

II. Discussion

A. Legal and Factual Sufficiency

1. Additional Facts

SB and FK became close friends in the two years they attended the same high school in Virginia and they kept in touch after FK's father, a major in the Air Force, was reassigned and moved with his family to Florida. FK's parents **[*6]** also developed a close relationship with SB, and FK's mother regarded SB as a daughter. SB graduated high school in Northern Virginia in the summer of 2016 when she was 18 years old. Her best friend, FK, was present at SB's graduation, and after the ceremony the two traveled together to Florida. SB stayed with FK and her family as a guest in their home near Patrick AFB.

SB arrived in Florida during the week before Father's Day weekend in June 2016. Shortly after, she joined FK on a visit to FK's father at the workplace he shared with Appellant. A week or two before SB's visit, FK's father told Appellant that SB was his daughter's best friend from high school, and Appellant would probably meet her. He portrayed SB as a pretty, athletic girl and showed Appellant her picture. Because FK's father knew Appellant was likely to make sexual comments during the visit, he told Appellant to tone down what Appellant said because SB was just 18 years old and might be uncomfortable with his jokes and sexual innuendo. On several occasions, FK and her family similarly prepared SB for Appellant's "very crude"

[6] We address the allegation that Appellant's military defense counsel were deficient during post-trial processing together with our resolution of his thirteenth assignment of error.

humor, explaining Appellant "just happens to make very inappropriate jokes, specifically towards **[*7]** women," always excusing Appellant's behavior as "very harmless."

At the workplace, SB was introduced to Appellant who right away made a comment about the size of her breasts. In that same visit SB dubbed FK a "tomboy," to which Appellant retorted, "No, [FK] doesn't have a penis she has a gigantic clit." SB left the office shortly after Appellant's comments. After the office visit, SB next saw Appellant when she and FK worked out at a gym. Although SB and Appellant had limited interaction, she overheard Appellant tell a friend in reference to SB, "Oh, look. [FK] brought me a little treat, another little treat." SB explained that FK had once introduced Appellant to a female friend from college who was adopted from China, and Appellant had remarked, "Oh, I want to eat my Chinese food. She's a treat of mine."

SB next saw Appellant on Father's Day. Appellant, his wife, and their two children joined FK's family and SB for brunch, and later in the afternoon were guests at a pool party and barbecue at FK's home. At one point, while SB played with Appellant's young daughter in the pool, Appellant swam up to SB, went underwater, and stared at a tattoo of a Bible verse on SB's right hip for about **[*8]** 30 seconds. SB found Appellant's behavior "very weird," and got out of the pool and changed into clothes.

At some point that day, FK's mother relayed to SB that Appellant gave good back rubs. Either in the kitchen with others present, or earlier in the day, Appellant gave backrubs to both SB and FK.[7] While in the kitchen, Appellant overheard a conversation about SB's inverted nipple, which prompted him to ask SB to show him her "boob" several times. SB testified she told Appellant "there is no way I am showing you my boob. That's not happening. I'm not doing that." Appellant approached FK on multiple occasions that afternoon to be, in Appellant's words, "his wingman" to help him convince SB to show him her breast. FK refused and at one point told Appellant to "please go away" because she "felt he was badgering [her] to make that happen."

Before dinner, and while FK, FK's mother, Appellant's wife, and others took a tour of nearby model homes, SB lay down alone on the bed in the room she was sharing with FK. FK's father stayed behind to finish preparing the meal, and asked Appellant to tell SB that dinner was ready. According to FK's father, Appellant left the kitchen, entered SB's room, **[*9]** and five to seven minutes passed until Appellant returned to the kitchen.

SB testified she was using her cell phone and her back was to the door when Appellant entered the bedroom and told her that dinner was ready. She replied she would be out shortly. Appellant approached her from behind as she lay on the bed and tickled up her leg. She felt Appellant's body "coming on over" hers, and was "frozen," thinking, this was another "joke." She asked Appellant, "What are you doing? What is this, a joke? What is going on right now?" and told Appellant, "This is not funny." Appellant replied, "No. This is not a joke. I'm not joking." SB described that Appellant was "hovering" over her body while telling her she was "gorgeous" and "need[ed] to make time for him," and that Appellant could "make this happen" if she babysat while Appellant's wife worked the night shift at her job.

SB noticed Appellant had an erection. She testified "things kept escalating" as she tried to get off the bed, when Appellant moved her underwear and "shoved his finger into [her] vagina." SB felt Appellant's knuckles as he digitally penetrated her. Her genitals were uncomfortable because she was recovering from a vaginal **[*10]** infection. SB told Appellant to "[g]et off of [her]," pushing him away on his upper body and he pulled his fingers out of her. SB ran to the bathroom, locked the door, and waited until she heard Appellant leave. She then returned to the bedroom to get her phone and promptly tried calling, and then texted, FK's phone. SB texted FK to "[c]ome home right f[**]king now," and "[l]iterally right now I'm hyperventilating." SB relayed that "[Appellant] just put his fingers in [her] vagina and kissed [her]," and pleaded for FK to "come home" because she was "freaking out," "can't breath[e,]" and was "bawling." SB texted FK again, asking FK to "[c]ome home," "please come home," to "[p]lease answer [her]," and relayed, "I'm hiding in your closet with the door locked." After getting no response from FK, SB tried calling FK's mother, but FK's father picked up his wife's phone and answered instead.

FK's father testified about what happened when Appellant returned to the kitchen and before he picked up his wife's cell phone. He asked Appellant, "Is everything all right?" and Appellant replied, "Yeah, everything is fine." A couple of minutes later, FK's father noticed his wife had left her cell phone **[*11]** behind when it started to ring. He looked at the phone and saw SB was identified as the caller, and thought it was odd

[7] SB testified on cross-examination that the backrub may have been earlier in the day and she was unsure of the timeline.

she was calling from inside the house. He answered the phone and SB asked him if he would "come down here please?" and not to be, in his words, "too conspicuous about it." FK's father entered his daughter's bedroom where SB was staying and saw that SB was teary-eyed and upset. He asked her what was wrong and SB replied, "He touched me . . . . Yeah, he touched me. He put his fingers in my vagina."

FK's father returned to the kitchen and asked Appellant, "Did you touch her inappropriately?" Appellant replied, "Yes," and tried to elaborate, but FK's father told Appellant he needed to "get [his] s[**]t and leave now." The group that had left the house were returning as Appellant was leaving. Appellant approached FK's mother and said, "I think I owe you an apology. . . . There was a misunderstanding between [SB] and me." FK and her mother then went to FK's bedroom and found the door was locked. SB opened the door and was crying. SB relayed to them that Appellant had touched her and put his fingers inside her vagina. SB reported the incident to her parents, and a civilian **[*12]** and military investigation ensued.

At some point during the gathering of families on Father's Day at FK's home, SB told FK she thought Appellant had a crush on her. FK found the idea silly, because she would "never know a Major in the Air Force to have a crush on an 18 year old girl."

2. Law

Appellant was convicted of ***HN1***[↑] sexual assault by bodily harm in violation of *Article 120(b)(1)(B), UCMJ, 10 U.S.C. § 920(b)(1)(B)*, which required the Government to prove four elements beyond a reasonable doubt: (1) that Appellant committed a sexual act upon SB by penetrating her vulva with his finger; (2) that Appellant did so by causing bodily harm to SB, to wit: penetrating her vulva with his finger; (3) that Appellant did so with an intent to gratify his sexual desire; and (4) that Appellant did so without the consent of SB.[8] *See Manual for Courts-Martial, United States* (2016 ed.) (*MCM*), pt. IV, ¶ 45.b.(4)(b). "'[B]odily harm' means any offensive touching of another, however slight, including any nonconsensual sexual act." *Article 120(g)(3), UCMJ, 10 U.S.C. § 920(g)(3)*. With regard to consent, the statute provides, "'[C]onsent' means a freely given agreement to the conduct at issue by a competent person." *Article 120(g)(8)(A), UCMJ, 10 U.S.C. § 920(g)(8)(A)*. "Lack of **[*13]** consent may be inferred based on the circumstances of the offense. All the surrounding circumstances are to be considered in determining whether a person gave consent, or whether a person did not resist or ceased to resist only because of another person's actions." *Article 120(g)(8)(C), UCMJ, 10 U.S.C. § 920(g)(8)(C)*.

HN3[↑] A court of criminal appeals may affirm only such findings of guilty "as it finds correct in law and fact and determines, on the basis of the entire record, should be approved." *Article 66(c), UCMJ, 10 U.S.C. § 866(c)*. "*Article 66(c)* requires the Courts of Criminal Appeals to conduct a *de novo* review of legal and factual sufficiency of the case." *United States v. Washington, 57 M.J. 394, 399 (C.A.A.F. 2002)* (citation omitted). Our assessment is limited to the evidence produced at trial. *United States v. Dykes, 38 M.J. 270, 272 (C.M.A. 1993)* (citations omitted).

HN4[↑] "The test for legal sufficiency is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Robinson, 77 M.J. 294, 297-98 (C.A.A.F. 2018)* (quoting *United States v. Rosario, 76 M.J. 114, 117 (C.A.A.F. 2017))*. "The term reasonable doubt, however, does not mean that the evidence must be free from conflict." *United States v. Wheeler, 76 M.J. 564, 568 (A.F. Ct. Crim. App. 2017)* (citing *United States v. Lips, 22 M.J. 679, 684 (A.F.C.M.R. 1986))*, *aff'd*, *77 M.J. 289 (C.A.A.F. 2018)*. "[I]n resolving questions of legal sufficiency, we are bound to draw every reasonable inference from the evidence **[*14]** of record in favor of the prosecution." *United States v. Barner, 56 M.J. 131, 134 (C.A.A.F. 2001)* (citations omitted).

HN5[↑] The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [we are ourselves] convinced of the [appellant]'s guilt beyond a reasonable doubt." *United States v. Turner, 25 M.J. 324, 325 (C.M.A. 1987)*. "In conducting this unique appellate role, we take 'a fresh, impartial look at the evidence,' applying 'neither a presumption of innocence nor a presumption of guilt' to 'make [our] own independent determination as to

[8] In a separate assignment of error, Appellant claims the specification fails to state an offense because the element of consent lacked a *mens rea* requirement. We disagree. ***HN2***[↑] "Congress clearly intended a general intent mens rea for *Article 120(b)(1)(B)*," *United States v. McDonald, 78 M.J. 376, 379 (C.A.A.F. 2019)*.

whether the evidence constitutes proof of each required element beyond a reasonable doubt.'" *Wheeler, 76 M.J. at 568* (alteration in original) (quoting *Washington, 57 M.J. at 399*).

3. Analysis [9]

Appellant argues the evidence is insufficient because SB was not a credible witness in that she did not attempt to push Appellant off of her sooner, and because of the inherent improbability that Appellant could have committed the act without her participation and, thus, consent. We conclude a reasonable factfinder would find SB's testimony and the supporting evidence both probable and convincing. SB's testimony provided convincing proof of each of the elements of the offense, to include that Appellant penetrated her **[*15]** vulva with his finger and did so without SB's consent and with intent to gratify his own sexual desire. Other evidence lends support to her testimony and proof of the charged offense, including SB's actions moments after the assault that included her texting FK that Appellant had "put his fingers in [her] vagina," SB's demeanor as observed by FK and FK's parents, and Appellant's admission to FK's father that he touched SB inappropriately and to FK's mother that Appellant owed her an apology.

Appellant also contends the Government failed to disprove that Appellant labored under an honest and reasonable mistake of fact as to consent. ***HN7***[⬆] Mistake of fact as to consent is a defense to sexual assault. *See* R.C.M. 916(j)(1). It requires that an appellant, due to ignorance or mistake, incorrectly believed that another consented to the sexual conduct. *See id.* To be a viable defense, the mistake of fact must have been honest and reasonable under all the circumstances. *See id.*; *see generally United States v. Jones, 49 M.J. 85, 91 (C.A.A.F. 1998)* (quoting *United States v. Willis, 41 M.J. 435, 438 (C.A.A.F 1995))* (charge of rape). Having just met before the weekend, Appellant and SB had little interaction before the offense and none of it was mutually sexual or involved activities unaccompanied by others. The settings were **[*16]** an office, a gym, and gatherings of families including children at a restaurant for breakfast and later at a co-worker's home on Father's Day. To be persuaded by Appellant's argument that he was mistaken, a factfinder would have to discount evidence that Appellant initiated sexual penetration of SB's vulva with his finger when he approached SB unannounced while she was alone in a bedroom with her back to the door. FK's father told Appellant to tone down Appellant's sexual comments and innuendo during SB's visit. SB rebuffed his request that she show Appellant her breasts, and FK told Appellant she would not be his "wingman" to convince SB otherwise. None of Appellant's interactions with SB before the offense should have led him or a reasonable person to believe that SB would consent to Appellant penetrating her vagina with his finger. On these facts we find the Government proved beyond a reasonable doubt that Appellant was not reasonably mistaken as to consent.

Considering the evidence in the light most favorable to the Prosecution, we find that a rational factfinder could have found Appellant guilty beyond a reasonable doubt of all the elements of sexual assault as charged. Furthermore, **[*17]** after weighing all the evidence in the record of trial and having made allowances for not having personally observed the witnesses, we are convinced of Appellant's guilt beyond a reasonable doubt. Therefore, we find Appellant's conviction both legally and factually sufficient.

B. Defense Motion for Continuance to Retain Civilian Counsel

1. Additional Background

The Charge and its two specifications were preferred on 31 January 2017 and an *Article 32, UCMJ, 10 U.S.C. § 832*, preliminary hearing took place on 3 February 2017. Appellant was informed of his right to counsel including the right to be represented by civilian counsel of his own choosing at his own expense, R.C.M. 405(d)(3)(C), and elected to be represented by military counsel.

Appellant was arraigned on the docketed trial date of 11 July 2017. During this *Article 39(a), UCMJ*, session, the first military judge informed Appellant of his right to retain civilian counsel under R.C.M. 506(a). After a defense continuance request to have access to a deployed witness, the trial was scheduled to reconvene

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[9] In his brief, Appellant's counsel cites information that was not introduced in the findings portion of trial for this court's determination of the factual and legal sufficiency of his conviction, and thus, this court cannot consider it. *See United States v. Reed, 54 M.J. 37, 43-44 (C.A.A.F. 2000)* (citations omitted) ***HN6***[⬆] (The "record" refers to matters introduced at trial. Matters outside the record may not be considered for factual or legal sufficiency on appeal).

on Monday, 8 January 2018, to allow time for the Government to obtain the unavailable witness[10] and produce discovery compelled by the first military judge. Meanwhile, Appellant released **[*18]** both of his detailed military counsel because they were set to begin new positions well before the new trial date,[11] and two different military trial defense counsel were detailed to represent Appellant.

Towards the end of the nearly seven month period that trial was delayed, Appellant avers he experienced growing unease about his military defense counsel and his case. In late December 2017 he reached out to a lawyer friend who advised Appellant to contact the CDC who would subsequently represent Appellant in post-trial matters and this appeal. Appellant contacted the CDC on Wednesday afternoon, 3 January 2018, and notified his military counsel on Friday, 5 January 2018, of his intent to retain the CDC. That same day the CDC signed a "Notice of Provisional Appearance" stating he was unavailable to begin a contested trial on Monday.

The CDC stated in the notice he was "conditionally retained" to represent Appellant "subject to the approval of the Presiding Military Judge." The CDC explained he "advised [Appellant] that [the CDC] was unavailable to begin a contested GCM on Monday, 8 January 2018, and that the Military Judge would have to approve a continuance." The provisional notice mentioned **[*19]** that the CDC discussed with Appellant "other motions and investigations that in [the CDC's] professional opinion would have to be done," but did not indicate when the CDC was available to appear in court. The notice mentioned the steps Appellant was taking to pay one-third of the CDC's retainer fee by Monday, with the rest paid not later than Friday, 12 January 2018.

On Saturday, 6 January 2018, Appellant's military defense counsel filed a motion to continue the case to give the CDC time to prepare for trial. Both the Government and SB, through her detailed victim's legal counsel (VLC), opposed the motion. Accompanying the motion was Appellant's own affidavit explaining he hired the CDC because of discomfort with the preparedness and experience of his military defense counsel.

On Monday, 8 January 2018, Judge Spath reconvened the court-martial as scheduled and held a hearing on the motion. He asked Appellant by whom he wished to be represented at trial, and Appellant identified both his detailed military defense counsel who were present and the CDC who was not. The CDC testified by telephone that he first spoke to Appellant five days before trial. The CDC explained he had formed an attorney-client **[*20]** relationship with Appellant and that the "provisional" notice of representation was patterned on a practice utilized in New York state courts. The CDC stated he would be available for trial during the week of 26 March 2018. On cross-examination, the CDC stated he did not have any upcoming trials but was working on "four habeas writs"[12] involving military trials and appeals that he needed to file before 20 March 2018. Both military counsel acknowledged they were prepared to represent Appellant.

After the military judge denied the motion for continuance and the CDC received Appellant's fee, the CDC did not file a notice of appearance with the trial court or otherwise indicate a change in the provisional nature of the notice he gave or that he was unconditionally retained to represent Appellant at trial.[13]

2. Law

HN8[↑] An accused has a *Sixth Amendment* right to counsel of choice. *United States v. Gonzalez-Lopez, 548 U.S. 140, 144, 126 S. Ct. 2557, 165 L. Ed. 2d 409 (2006)* (citations omitted). If an appellant has been erroneously deprived of this right, then the "violation is not subject to harmless-error analysis." *Id. at 152*. A trial court nonetheless has "wide latitude in balancing the right to counsel of choice against the needs of fairness and against the demands of its calendar." The United States Supreme **[*21]** Court has observed:

> Trial judges necessarily require a great deal of latitude in scheduling trials. Not the least of their problems is that of assembling the witnesses, lawyers, and jurors at the same place at the same time, and this burden counsels against continuances except for compelling reasons.

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[10] In the end, the witness did not testify.

[11] On 14 July 2017, Appellant released his first pair of military defense counsel. When he did so, Appellant signed two written releases that advised him of his right to hire and be represented by civilian defense counsel.

[12] Writs of habeas corpus. *See All Writs Act, 28 U.S.C. § 1651(a)*.

[13] In a post-trial declaration to this court, the CDC avers "[a]s the court-martial progressed, [the CDC] was in continuous contact either via telephone or email with [Appellant] and his detailed counsel, and assisting them 'remotely' on some of the legal issues that were arising during the trial."

> Consequently, broad discretion must be granted trial courts on matters of continuances; only an unreasoning and arbitrary "insistence upon expeditiousness in the face of a justifiable request for delay" violates the right to the assistance of counsel.

Morris v. Slappy, 461 U.S. 1, 11-12, 103 S. Ct. 1610, 75 L. Ed. 2d 610 (1983) (quoting *Ungar v. Sarafite, 376 U.S. 575, 589, 84 S. Ct. 841, 11 L. Ed. 2d 921 (1964)*); *United States v. Wellington, 58 M.J. 420, 425 (C.A.A.F. 2003)*.

HN9[↑] We review a military judge's denial of a request for a continuance to be represented by civilian counsel of choice for an abuse of discretion. *United States v. Wiest, 59 M.J. 276, 279 (C.A.A.F. 2004)* (citing *United States v. Weisbeck, 50 M.J. 461, 464-66 (C.A.A.F. 1999)*). In determining whether the military judge abused his discretion, we consider the factors articulated in *United States v. Miller, 47 M.J. 352, 358 (C.A.A.F. 1997)* (citation omitted). *See Wiest, 59 M.J. at 279* (citations omitted) (listing *Miller* factors). The factors include:

> surprise, nature of any evidence involved, timeliness of the request, substitute testimony or evidence, availability of witness or evidence requested, length of continuance, prejudice to opponent, moving party received prior continuances, good faith of moving party, use of reasonable **[*22]** diligence by moving party, possible impact on verdict, and prior notice.

Miller, 47 M.J. at 358 (quoting F. Gilligan and F. Lederer, *Court-Martial Procedure*, § 18-32.00, at 704 (1991)).

HN10[↑] An abuse of discretion "requires more than just [a reviewing court's] disagreement with the military judge's decision." *United States v. Bess, 75 M.J. 70, 73 (C.A.A.F. 2016)* (citing *United States v. Stellato, 74 M.J. 473, 480 (C.A.A.F. 2015)*). An abuse of discretion occurs when the military judge's findings of fact are clearly erroneous, when an erroneous view of the law influenced his decision, or when his decision is "outside the range of choices reasonably arising from the applicable facts and the law." *Id.* (quoting *Stellato, 74 M.J. at 480*). The challenged decision "must be arbitrary, fanciful, clearly unreasonable, or clearly erroneous." *United States v. Solomon, 72 M.J. 176, 179 (C.A.A.F. 2013)* (quoting *United States v. White, 69 M.J. 236, 239 (C.A.A.F. 2010)*.

3. Military Judge's Ruling Denying the Continuance

Trial was scheduled to commence on Monday, 8 January 2018, as agreed upon by all parties in late July 2017. In an oral ruling at the *Article 39(a), UCMJ*, session, on 8 January 2018, the military judge denied the Defense's motion for a continuance. The military judge supplemented his ruling on the record, adding greater detail on Thursday, 11 January 2018, the last day of trial. He found the parties agreed on 31 July 2017 to reconvene for trial the week of 8 January 2018. **[*23]** Between 31 July 2017 and 5 January 2018, Appellant's military counsel participated in joint status updates and none mentioned the potential for civilian counsel to represent Appellant. On Friday, 5 January 2018, the Defense notified the Government and military judge that the Defense would request a continuance. The military judge received this notice at 1622 hours on the last weekday before the 8 January 2018 trial date.

On Saturday, 5 January 2018, the CDC entered a notice of a provisional appearance contingent on receipt of fees and a delay in the proceedings. The CDC did not have any court appearances scheduled for the week of Appellant's trial. He did not make any efforts to travel to Patrick AFB in advance of trial,[14] and he did not formally enter an appearance while awaiting payment of his retainer. The CDC had no trial obligations between the date of trial and 28 March 2018,[15] the date of the requested continuance, but he needed to file four habeas petitions.

The military judge found the CDC did not enter a formal appearance after he received the retainer fee from Appellant on 8 January 2018. He found the March 2018 continuance date "a bit optimistic" bearing in mind that the CDC **[*24]** indicated further investigations and motion practice would have to be done. The military judge observed that the charge sheet had been served on Appellant in March[16] "and motion practice had already been completed in July of 2017." The military judge noted that the CDC picked the March 2018 date "with no discussion of availability of other counsel or

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[14] The CDC averred that a snowstorm at the CDC's location when trial began prohibited travel to Patrick AFB.

[15] This finding was error. The date the CDC said he was available was 26 March 2018.

[16] The referred charge and specifications were served on 6 March 2017. The military judge misstated the service date as "March of '16."

other witnesses."

After considering Appellant's burden as the moving party, R.C.M. 906, and relevant case law, the military judge denied Appellant's continuance request. The military judge considered whether fairness dictated he should grant the request, with fairness assessed against Appellant's *Sixth Amendment* right to counsel. Citing *Morris*, the military judge observed the right is not absolute and must be balanced against society's interest in the efficient and expeditious administration of justice. In performing this assessment, the military judge found that he should consider a named victim's right under *Article 6b(a)(7), UCMJ, 10 U.S.C. § 806b(a)(7)*, to have a proceeding free from unreasonable delay, so long as the assertion of that right did not deprive an accused of his *Sixth Amendment* right. The military judge stated that even if a reviewing court found that SB lacked standing on a continuance **[*25]** motion, his analysis would remain the same.

Before analyzing the *Miller* factors, the military judge found that Appellant was informed of his right to retain civilian counsel multiple times and had sufficient opportunity to retain civilian counsel of his choice. Considering the significant delay already in the case, and the fact that Appellant had sufficient opportunity to obtain civilian counsel, the military judge found that proceeding to trial was "neither unreasonable [n]or arbitrary."

The military judge then applied the *Miller* factors he considered germane to consideration of a continuance[17] and denied Appellant's request. As to each factor, he found as follows:

a. Surprise

The timing of Appellant's continuance request was a surprise to the trial court and to the Government because it came at the end of the last business day before trial was set to commence. The military judge found this factor weighed against Appellant, citing the multiple times Appellant "was informed of, indicated he understood, and exercised his rights to counsel."

b. Timeliness of the request

The military judge found Appellant "had more than a reasonable ability and opportunity to secure **[*26]** counsel of his choice" after July 2017 and that "[h]e failed to do so in a timely manner despite being advised of his rights on multiple occasions and exercising them on at least one occasion." Appellant's request was untimely, he found, because Appellant did not request the continuance until the end of the last business day before trial, after the parties agreed on 31 July 2017 to reconvene for trial the week of 8 January 2018. The military judge found this factor weighed against Appellant.

c. Availability of witness or evidence requested

While noting that Appellant's continuance request was not based on a request for evidence or a witness, the military judge noted that the parties agreed to the January 2018 date, and that further delay would require the Government to rearrange witness travel. The military judge took note that scheduling of the 8 January 2018 trial included consideration of the availability of a witness whose presence Appellant had requested. This factor weighed against Appellant.

d. Length of continuance

The military judge considered that Appellant's CDC requested a delay until the last week of March 2018, but this date did not account for the availability of other witnesses, **[*27]** experts, and the Government counsel. Based on the CDC's indication that further investigation and motion practice would have to be done, the military judge considered the March date "optimistic." He found a nearly three-month delay after a six-month delay weighed against Appellant especially considering that the CDC did not have any trials during this period that justified the delay.

e. Prejudice to opponent

The military judge found the Government had "some limited right in the orderly administration of justice." He found a concern that delay in timely presentation of testimony on the merits could affect witness testimony and the memory on which it depends. In assessing this factor, he considered SB's *Article 6b, UCMJ*, right to a

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[17] The military judge found two factors inapplicable, and they were not part of his analysis: the nature of any evidence involved and the availability of substitute testimony or evidence. *See Miller, 47 M.J. at 358* (quoting F. Gilligan, *Court-Martial Procedure*, § 18-32.00, at 704).

proceeding free from unreasonable delay that SB's VLC asserted on her behalf, but observed "[t]his factor didn't carry very much weight in [his] analysis." The military judge found what little weight it did have favored the Government.

f. Moving party received prior continuance

The military judge found Appellant had already been granted a six-month continuance to secure the attendance of a possible witness and to align a new trial date with the schedules of counsel for both **[*28]** sides and all witnesses. The military judge noted the original docketed 11 July 2017 trial date was established in April 2017. The military judge found this factor weighed against Appellant

g. Good faith of moving party

The military judge contrasted the good faith of Appellant's military counsel—who notified the military judge as soon as they were aware Appellant planned to hire the CDC—with Appellant's actions, which he found "problematic." Specifically, the military judge referred to Appellant's decision to wait until the last business day before trial to be represented by the CDC, which generated the request. The military judge found this factor was "reasonably neutral" and stated "I have no doubt the party acted in good faith." The military judge contrasted again the good faith of Appellant with that of the CDC who took on representation for a trial he knew he could not attend that was starting the next business day. The military judge took into account that the CDC had not entered an appearance even after he had been retained and the CDC's retainer payment was no longer pending.

h. Use of reasonable diligence by moving party

The military judge found Appellant did not show diligence **[*29]** in making the request because "[i]t was provided to this court [at] 1622 hours on 5 January 2018, the very end of the last business day before trial was scheduled to commence. At best, initial contact was made with civilian counsel by the accused on 3 January 2018."

i. Possible impact on verdict

The military judge found two qualified military defense counsel represented Appellant, including an experienced senior defense counsel. He noted both counsel proffered they were prepared for trial and that they would, and did, provide effective representation. The military judge caveated his analysis of this factor noting that his assessment that Appellant "did receive effective representation" was "not relevant to this ruling" because he denied the continuance before he could observe the effectiveness of counsel. The military judge found that "[a]dding a counsel is going to have no appreciable effect on the verdict simply because he happens to be a civilian counsel," and appeared to weigh this factor against Appellant without stating as such.

j. Prior notice

The military judge found there was no issue of prior notice of the January 2018 proceeding, and this factor weighed against Appellant. The **[*30]** date trial was scheduled to reconvene was established on 31 July 2017. Appellant had been on notice of the 8 January 2018 trial date for over five months.

4. Analysis

The military judge did not abuse his discretion when he denied the Defense's motion. The military judge detailed his consideration of the *Miller* factors in his ruling, and the weight of the factors fell in favor of the Government. ***HN11***[↑] *Miller* examines a number of factors useful in determining whether a judge has abused his discretion. We, too, consider the application of those factors bearing in mind that "[t]here are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process." *Ungar, 376 U.S. at 589*. Although the right of the victim to a proceeding free from unreasonable delay is not among the listed factors, the military judge appropriately considered it when determining if there was prejudice to Government and did not give the matter undue weight.

A fair reading of the record suggests that there was no "unreasoning and arbitrary 'insistence upon expeditiousness in the face of a justifiable request for delay.'" *Morris, 461 U.S. at 11-12* (quoting *Ungar, 376 U.S. at 589*). If there was one controlling factor in the ruling, it is whether Appellant had **[*31]** reasonable opportunity to secure counsel of choice, *see Miller, 47 M.J. at 358*, and the military judge found Appellant had been given that opportunity. That Appellant failed to

secure counsel of choice in a timely manner was relevant to HN12[↑] the military judge's "wide latitude" to balance the right to counsel against the court's calendar, *see* Gonzalez-Lopez, 548 U.S. at 151 (citation omitted). Indeed, the focus of the ruling was that Appellant had been informed of his right to be represented by civilian counsel and did not begin searching for civilian representation until late December 2017, after a lengthy continuance had been granted, and then secured provisional representation on the eve of trial reconvening.

The military judge gave appropriate consideration to the provisional nature of the CDC's notice of appearance, which stated that the CDC was "conditionally retained" to represent Appellant "subject to the approval of the Presiding Military Judge." Both the timing and substance of the notice were properly relied on by the military judge. The record shows Appellant's request for a nearly three-month delay was not based on a need to deconflict the CDC's trial schedule—he had none, and offered little assurance that a third continuance **[*32]** would not be necessary.

The military judge made findings of fact supported by the evidence, applied those facts to the appropriate law, and used the *Miller* factors to conclude Appellant's continuance request was unreasonable. The military judge's application of the *Miller* factors and his decision to deny the request was not "clearly untenable," Miller, 47 M.J. at 358 (quoting United States v. Travers, 25 M.J. 61, 62 (C.M.A. 1987)), or "outside the range of choices reasonably arising from the applicable facts and the law," Bess, 75 M.J. at 73 (quoting Stellato, 74 M.J. at 480). We conclude his decision was neither arbitrary, fanciful, clearly unreasonable, nor clearly erroneous. *See* Solomon, 72 M.J. at 179 (quoting White, 69 M.J. at 239).

C. Alleged Denial of Right to a Public Trial

On two occasions, the first military judge held an Article 39(a), UCMJ, session and closed the courtroom to spectators to determine whether evidence that might qualify as sexual behavior or predisposition was admissible in Appellant's trial. *See* HN13[↑] Mil. R. Evid. 412(c)(2) ("Before admitting evidence under this rule, the military judge must conduct a hearing, which shall be closed."). The record shows spectators departed the courtroom on both occasions before the military judge took evidence to decide admissibility. Appellant did not object to the closures nor did any member of the public. Before **[*33]** the first closure and while SB was on the witness stand, the military judge asked the Defense, "So, my understanding is we want to take up some additional matters in closed session than [sic] at this time?" The trial defense counsel who at the time was conducting a direct examination of SB replied, "Yes, sir," and continued his examination of SB in the closed session. After going back into open session of the court and before the second closure, the military judge notified the parties of a matter he would consider in a closed session and then asked the Defense if there was "anything further?" before closing the court. The trial defense counsel replied, "No, sir, not in this open session." In the closed session that followed, the military judge, counsel for both parties, and SB's VLC discussed a matter that SB's VLC claimed was protected by his attorney-client privilege with SB, as well as a matter involving SB's medical and cell phone records as they related to the Government's discovery obligation and Mil. R. Evid. 412 admissibility.

Appellant contends for the first time on appeal that he was denied his Sixth Amendment right to a public trial and the military judge erred in failing to conduct the four-part closure **[*34]** analysis under R.C.M. 806(b)(5). *See also* Waller v. Georgia, 467 U.S. 39, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984) (holding state court failed to give proper weight to a criminal defendant's Sixth Amendment right to a public trial at a weeklong suppression hearing that was closed over defense objection).

Appellant observes that the military judge and *all* counsel apparently just assumed that the closure and sealing provisions of Mil. R. Evid. 412(c)(2) controlled the matter. We find Appellant waived this issue by failing to object so that the military judge might conduct the closure analysis, which we decline to conduct after the fact. HN14[↑] It is the military judge, not a court of criminal appeals, that "makes case-specific findings on the record justifying closure." *See* R.C.M. 806(b)(5). We decline Appellant's suggestion that we should find structural error and remand for a new trial because this was not done.

Appellant's failure to object at trial waived the right to challenge the closed hearing requirement of Mil. R. Evid. 412(c)(2), and thus leaves no error for this court to correct on appeal. *See* Levine v. United States, 362 U.S. 610, 619-20, 80 S. Ct. 1038, 4 L. Ed. 2d 989 (1960) (counsel and client forfeited public trial challenge by failing to ask trial judge to open the proceedings);

see also Peretz v. United States, 501 U.S. 923, 936, 111 S. Ct. 2661, 115 L. Ed. 2d 808 (1991) **HN15**[⬆] ("failure to object to closing of courtroom is waiver of right to public trial" (citing Levine, 362 U.S. at 619)). In reaching this result we recognize that **[*35]** in *United States v. Hershey*, a case decided 25 years after the Supreme Court decided *Levine*, our superior court applied a more stringent test than the Supreme Court did in *Levine*, requiring an appellant's waiver of a public trial to be "intentional and knowing." 20 M.J. 433, 437 (C.M.A. 1985) (quoting Martineau v. Perrin, 601 F.2d 1196, 1200 (1st Cir. 1979)) (additional citation omitted) (refusing to apply the doctrine of waiver). *Hershey* relied on a decision by the United States Court of Appeals for the First Circuit, Martineau v. Perrin, 601 F.2d 1196, 1200 (1st Cir. 1979), as authority for this conclusion, and cited Supreme Court precedent that predated *Levine* for support.[18] Hershey, 20 M.J. at 437. The Supreme Court's later decision in *Peretz* and those of several federal circuits including the First Circuit cast doubt on the validity of Hershey as precedent.[19]

Even if *Hershey* remains the law of this jurisdiction after the Supreme Court in *Peretz* followed the Court's precedent in *Levine*, we still find waiver. The trial defense counsel did not just fail to object, but acceded both times to the closed session. Before the first closure, Appellant's counsel agreed with the military judge's understanding that the Defense wanted to continue its direct examination of a witness **[*36]** in a closed session. Before the second closure, counsel agreed there was nothing further to discuss in the open session. Both the statements and actions of counsel evince an "intentional and knowing" waiver on Appellant's behalf. *See* Hershey, 20 M.J. at 437. Thus, Appellant's public trial challenge to Mil. R. Evid. 412 was waived, *see id.*, and we determine to leave the waiver intact, *see* United States v. Chin, 75 M.J. 220, 223 (C.A.A.F. 2016) (citation omitted) **HN16**[⬆] (courts of criminal appeals "are required to assess the entire record to determine whether to leave an accused's waiver intact, or to correct the error.").

D. Challenge to the Reasonable Doubt Instruction

Also for the first time on appeal, and what appears to be an issue of first impression, Appellant challenges the reasonable doubt instruction the military judge gave as constitutionally unsound. Appellant claims it was error to instruct that a reasonable doubt is one "arising from the state of the evidence," as the military judge stated in both his preliminary instructions to the members and again after the close of evidence. Appellant claims he was denied a fair trial because the military judge erred in failing to instruct that reasonable doubt may arise from a lack of evidence as opposed to the state of the evidence. **[*37]** Appellant argues we should find structural error and remand for a new trial.

Before trial, Appellant advocated for a modified reasonable doubt instruction and raised an objection to the standard instruction that is unlike the challenge he makes now.[20] After the close of the Government's case, the military judge requested proposed instructions from counsel for both parties. Appellant requested a mistake of fact instruction, but did not seek a modified reasonable doubt instruction as he did before trial. After the military judge circulated his draft instructions, Appellant asked for an instruction regarding his decision not to testify and again proposed no modification to the reasonable doubt instruction. The military judge asked whether the Defense had any objections or requests for additional instructions. Trial defense counsel replied, "No. Your Honor." After the arguments of counsel the military judge again asked the Defense if there were any objections to the findings instructions or request for

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[18] Johnson v. Zerbst, 304 U.S. 458, 464, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938).

[19] *See, e.g.,* United States v. Reagan, 725 F.3d 471, 488-89 (5th Cir. 2013) (knowledge of courtroom closure and failure to object unreviewable), *cert. denied*, ***572 U.S. 1003, 572 U.S. 1003, 134 S. Ct. 1514, 188 L. Ed. 2d 452 (2014)***; United States v. Christi, 682 F.3d 138, 142-43 (1st Cir. 2012) ("In *Peretz*, the Supreme Court expressly cited [Levine v. United States, 362 U.S. 610, 619, 80 S. Ct. 1038, 4 L. Ed. 2d 989 (1960)] for the proposition that a failure to object to closing a courtroom waives any claim of infringement to a right of public trial."), *cert. denied*, ***568 U.S. 988, 133 S. Ct. 549, 184 L. Ed. 2d 357 (2012)***; Johnson v. Sherry, 586 F.3d 439, 444 (6th Cir. 2009) (If the litigant does not assert the right to a public trial "in a timely fashion, he is foreclosed." (quoting Freytag v. Commissioner, 501 U.S. 868, 896, 111 S. Ct. 2631, 115 L. Ed. 2d 764 (1991)), *overruled in part on other grounds by* Weaver v. Massachusetts, 137 S. Ct. 1899, 1907, 198 L. Ed. 2d 420 (2017).

[20] Appellant moved for appropriate relief to instruct that the members "should," and not "must," convict if they are convinced of Appellant's guilt beyond a reasonable doubt. The first military judge denied the motion in an Article 39(a), UCMJ, session without members. The military judge who presided on the merits instructed that the members "may find" Appellant guilty of an offense if they are firmly convinced of guilt.

additional instructions. Counsel again answered in the negative.

HN17[] Whether an appellant has waived an objection to a findings instruction is a legal question that this court reviews de novo. United States v. Davis, 79 M.J. 329 , No. 19-0104, 2020 CAAF LEXIS 76, at *6-7 **[*38]** (C.A.A.F. 12 Feb. 2020) ("By 'expressly and unequivocally acquiescing' to the military judge's instructions, Appellant waived all objections to the instructions." (quoting United States v. Smith, 2 C.M.A. 440, 9 C.M.R. 70, 72 (C.M.A. 1953))). The CAAF in *Davis* repeated what the court has previously explained is the significance of waiver, as opposed to forfeiture:

> "Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right." United States v. Gladue, 67 M.J. 311, 313 (C.A.A.F. 2009). Consequently, while we review forfeited issues for plain error, "we cannot review waived issues at all because a valid waiver leaves no error for us to correct on appeal." United States v. Campos, 67 M.J. 330, 332 (C.A.A.F. 2009).

Id. at *6 (internal quotation marks omitted).

Before trial, Appellant suggested a modification to the reasonable doubt instruction without identifying changes to the language he now claims is constitutionally deficient. Then, at trial he twice declined to propose an instruction like the one he proposes now, and twice declined to object to the instruction and offered no additional instructions when prompted by the military judge. On these facts, Appellant expressly and unequivocally acquiesced to the reasonable doubt instruction the military judge gave to the members. *See* Davis at *7 (citing United States v. Wall, 349 F.3d 18, 24 (1st Cir. 2003) ("[C]ounsel twice confirmed upon inquiry from the judge that he had 'no objection **[*39]** and no additional requests [regarding the instructions].' Having directly bypassed an offered opportunity to challenge and perhaps modify the instructions, appellant waived any right to object to them on appeal." (alteration in original))). Appellant thus waived the objection he raises on appeal, *see id.*, and we determine to leave his waiver intact, *see* Chin, 75 M.J. at 223 (citation omitted).

E. Sentencing

Appellant assigns five errors he claims occurred in sentencing. First, Appellant claims he was denied his Sixth Amendment right to confront SB after she read an unsworn victim impact statement in presentencing. Second, he alleges the military judge abused his discretion by sustaining an objection to documents Appellant wanted to attach to his written unsworn statement. Third, he claims he was deprived of due process and equal protection under the law in violation of his rights under the Fifth Amendment because he was prohibited from including the attachments in his unsworn statement, and yet SB could discuss the collateral consequences of Appellant's crime in her unsworn statement. Fourth, he claims that it was error for the military judge to allow Appellant to mention the consequence to him of having to register as a sex offender, **[*40]** and then instruct the members to disregard those consequences.[21] Lastly, Appellant claims his sentence that includes a mandatory dismissal was unconstitutional and inappropriately severe.

1. Additional Background

After the Government rested its sentencing case, SB read an unsworn statement. She described how "a lot of things changed" in her life after the sexual assault including her relationship with her best friend and her best friend's family. It also affected her "entire freshman year of college," which was "full of sadness, loss, doubt, and a lack of self-esteem." In the summer after her first year "she couldn't hold [her] part-time job because of [her] distress for strangers and fear of being alone." SB thanked the members for their "gift of closure" and conveyed optimism that with the trial over she could restore her friendship with her best friend, and could "start to live life as a normal college student" without interruptions to talk to investigators and attorneys. The military judge prefaced SB's statement with an instruction to the members about how they could use the information SB presented:

> The weight and significance to be attached to an unsworn statement rests with the **[*41]** sound

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[21] Appellant's appellate counsel does not assert instructional error on its own, but includes it as a footnote to the assignment of error that alleges the military judge erred when he excluded the two attachments. We consider the issue even though counsel did not raise a distinct claim that the military judge abused his discretion. *See* JT. CT. CRIM. APP. R. 18(a) (effective 1 Aug. 2019) ("Appellate Counsel for the accused may file assignments of error, setting forth separately each error assigned.").

> discretion of each court member. You may consider that the statement is not under oath, it's [sic] inherent probability or improbability, whether it is supported or contradicted by evidence in the case, as well as any other matter which may have a bearing upon its credibility. In weighing and [sic] unsworn statement you are expected to use your common sense, and your knowledge of human nature, and the ways of the world.

In the presentencing proceeding, Appellant elected to give a verbal unsworn statement in response to questions that were put to him by his counsel. The military judge first gave an instruction about the unsworn statement that was similar to the one he gave before SB's statement. Appellant said he thought about the day of the incident "[e]very day," and how "one lapse of judgment" "can screw everything up." He acknowledged understanding he would be a "registered sex offender just based on this conviction"[22] and that his status would impact his ability to go to meetings at his children's school, and also to be present at his children's gymnastics and cheerleading practices. Appellant explained to the members this was because, based on his understanding, "a registered **[*42]** sex offender isn't allowed anywhere near schools or anything like that regardless of it being a minor or an adult offense," and these limitations would last a "lifetime." Appellant told the members that the mandatory dismissal "as well as being a registered sex offender" would make it hard for him to find a job. He emphasized, that no matter how much time he would spend confined, "a dismissal and having to register is going to affect everything."

At the end of Appellant's verbal presentation, the trial defense counsel offered Appellant's written unsworn statement that was substantially the same as Appellant's verbal statement and marked it as a Defense Exhibit. The written presentation as offered included two attachments: a 5-page appendix to a Department of Defense Instruction (DoDI) listing offenses that require sex-offender processing;[23] and a 22-page article about the collateral consequences of sex-offender registry laws.[24] The trial counsel objected to the inclusion of these attachments on grounds that they were not Appellant's statements. Trial defense counsel defended their inclusion, in part, arguing it was the Defense's "understanding that [the members] are going to be given an **[*43]** instruction, essentially, to disregard this as part of the[ir] deliberation[s]" and that the instruction would place the attachments "in the proper context." The military judge sustained the objection for two reasons: (1) neither document was Appellant's own statement; and (2) admitting them as an exhibit and then charging the members to disregard collateral consequences of sex offender registration requirements in arriving at a sentence was inapposite. The military judge allowed the Defense to publish Appellant's written unsworn statement without the attachments that was marked as a Defense Exhibit. He instructed the members it was part of Appellant's unsworn statement and reminded them of the instructions he had given earlier regarding unsworn statements.

Trial defense counsel did not object to the military judge's sentencing instructions, which included this description of sex-offender registration requirements and that collateral consequences of Appellant's conviction should not be **[*44]** part of the members' deliberations in reaching a sentence:[25]

> Under DOD instructions when convicted of certain offenses, including the offense here, the accused must register as a sex offender for the appropriate authorities and the jurisdiction of which he resides, works, or goes to school. Such registration is required in all 50 states. The requirements may differ between jurisdictions. Thus, specific requirements are not necessarily predictable. It is not your duty to attempt to predict sex offender registration requirements or the consequences thereof.
>
> While the accused is permitted to address these matters . . . in an unsworn statement, these possible collateral consequences should not be part of your deliberations in arriving at a sentence. Your duty is to adjudge an appropriate sentence for this accused based upon the offense for which he has

[22] The trial defense counsel asked, "Now you know you'll have to be a registered sex offender just based on this conviction, correct?" Appellant answered, "Yes, ma'am."

[23] Department of Defense Instruction 1325.07, *Administration of Military Correctional Facilities and Clemency and Parole Authority*, Encl. 2, App. 4 (11 Mar. 2013) ("Listing of Offenses Requiring Sex Offender Processing").

[24] Erika D. Frenzel, *Understanding Collateral Consequences of Registry Laws: An Examination of the Perceptions of Sex Offender Registrants*, 11 JUST. POL'Y J. 2 (Fall 2014).

[25] The instruction was modeled on the sentencing instructions in the *Military Judges' Benchbook*, Dept. of the Army Pamphlet 27-9 at 75 (10 Sep. 2014).

> been found guilty that you regard as fair and just when it is imposed and not one whose fairness depends on possible requirements of sex offender registration and the consequences thereof in certain locations in the future.

Before issuing the above instruction to the members, the military judge gave both parties the **[*45]** opportunity to discuss his proposed sentencing instructions, including the one he gave in response to Appellant's unsworn statement regarding sex offender registration. Afterwards, in an *Article 39(a), UCMJ*, session, the military judge asked whether the Defense had any objections or requests for additional instructions. Other than a request to highlight a matter in mitigation involving Appellant's family, the Defense responded, "And that's it, Your Honor." After a brief recess during which the military judge finalized his instructions, the military judge asked again if the Defense had any objections or request for additional instructions. The trial defense counsel replied, "No, Your Honor." After argument by both sides, the military judge again asked if the Defense had any objections or request for additional instructions. The Defense replied it had no objections to the instructions that were given.

2. Victim's Unsworn Statement and Confrontation

Appellant claims R.C.M. 1001A(e), which authorizes a crime victim to give an unsworn statement in presentencing, is unconstitutional on its face and as applied on grounds that it deprives Appellant and those similarly situated of their *Sixth Amendment* right of confrontation **[*46]** at a critical stage of a criminal trial. Although Appellant did not object at trial, under any standard of review we disagree.

HN18[↑] "[T]he *Sixth Amendment* right of confrontation does not apply to the presentencing portion of a non-capital court-martial." *United States v. McDonald, 55 M.J. 173, 177 (C.A.A.F. 2001)*. In *McDonald*, a three-judge majority noted that "Congress would not be disabled from changing the sentencing procedures in the military." *Id. at 177*. Judge Sullivan, concurring in the result, agreed with the majority that "the *Sixth Amendment* does not require an adversarial sentencing proceeding with a right of confrontation." *Id. at 179* (Sullivan, J., concurring) (citation omitted).

In 2013, Congress revised presentencing procedures by enacting *Article 6b(a)(4)(B), UCMJ, 10 U.S.C. § 6b(a)(4)(B)*,[26] to give a crime victim the right to be reasonably heard. In a 2015 amendment to the *Manual for Courts-Martial, United States*,[27] R.C.M. 1001A was added to implement *Article 6b(a)(4)(B), UCMJ*, and to allow a victim to make an unsworn statement that is not subject to cross-examination, though either party may "rebut any statements of facts therein." R.C.M. 1001A(e). Accordingly, the right to confrontation did not extend to the presentencing proceeding of Appellant's court-martial, and we find no error.

3. Exclusion of Attachments to Appellant's Unsworn [*47] Statement

Appellant maintains the military judge erred in ruling to exclude the attachments to Appellant's written unsworn statement that referenced sex offender registration and its consequences.[28] Appellant claims the attachments would have explained the consequences of the *Federal Sexual Offender Registration and Notification Act (SORNA)*[29] to the factfinder and were permissible matters in mitigation under R.C.M. 1001(c)(1)(B).

HN19[↑] Our superior court has held that the consequences of sex offender registration are not a proper consideration for sentencing. *United States v. Talkington, 73 M.J. 212, 216 (C.A.A.F. 2014)* (addressing a military judge's instruction regarding an appellant's unsworn statement and observing that the proper focus of sentencing is on the offense and the character of the accused, and "to prevent the waters of

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[26] ***National Defense Authorization Act (NDAA) for Fiscal Year 2014 (FY14), Pub. L. No. 113-66, § 1701, 127 Stat. 672, 952 (2013)***.

[27] On 17 June 2015, the President signed Executive Order 13,696 ("2015 Amendments to the Manual for Courts-Martial, United States"). Exec. Order No. 13,696, 80 Fed. Reg. 35,783 (22 Jun. 2015).

[28] Appellant further claims he was deprived of due process and equal protection under the law, *U.S. Const. amend. V*, because he was prohibited from including the attachments, and yet SB could discuss the "collateral consequences" of Appellant's crime through her unsworn victim impact statement. SB's victim impact statement addressed victim impact matters authorized by R.C.M. 1001A. We find this issue does not require further discussion or warrant relief. *See United States v. Matias, 25 M.J. 356, 361 (C.M.A. 1987)*.

[29] *Sex Offender Registration and Notification Act, 34 U.S.C. §§ 20901-962*, formerly *42 U.S.C. §§ 16901-991*.

the military sentencing process from being muddied by an unending catalogue of administrative information" (quoting *United States v. Rosato, 32 M.J. 93, 96 (C.M.A. 1991))* (internal quotation marks omitted)). Although an appellant may reference sex offender registration in his unsworn statement, *id. at 217* (citations omitted), we find no authority and Appellant cites none for the proposition that an appellant has an unfettered right to attach anything he wants to an unsworn statement and then have it marked **[*48]** as an exhibit and admitted into evidence, or otherwise presented to the factfinder, to determine an appropriate sentence.

HN20[↑] The plain language of R.C.M. 1001(c)(2)(C) allows for an unsworn statement given "by the accused," his counsel, or both. Consistent with the rule, the military judge did not preclude Appellant from commenting on sex offender registration requirements, which Appellant brought to the attention of the members in his verbal unsworn statement and again in a written unsworn statement that the military judge admitted as a Defense Exhibit. The DoDI appendix and journal article are neither a statement by Appellant nor by counsel on his behalf and are instead the statements of others. We conclude that the military judge did not abuse his discretion in excluding evidence of statements not written by Appellant, which contained inadmissible information about collateral consequences of a court-martial conviction.

4. Instruction on Sex Offender Registration

At trial, Appellant's counsel argued that the attachments at issue were "within the scope" of the permissible bounds of an unsworn statement and that, as with Appellant's own statements about sex offender registration, in due course the military **[*49]** judge would just instruct the members to disregard the attachments as part of their deliberations. Although the trial defense counsel did not object to the limiting instruction the military judge gave, on appeal Appellant claims the military judge erred in giving the instruction.[30]

HN21[↑] While an appellant's right of allocution in presentencing may be very broad, a military judge may provide instructions to the members to limit his statements and place them in their proper context. *See United States v. Grill, 48 M.J. 131, 133 (C.A.A.F. 1998)*. In *Talkington*, our superior court held that sex offender registration is a collateral consequence of the conviction alone and has no causal relationship to the sentence imposed for the offense. *73 M.J. at 216-17*. Thus, while an accused is permitted to raise this collateral consequence in his unsworn statement, "the military judge may instruct the members essentially to disregard **[*50]** the collateral consequence in arriving at an appropriate sentence for an accused." *Id. at 213* (citations omitted).

Appellant is resolute in his appeal that *Talkington* was wrongly decided and the military judge erred even if he "considered himself bound by it." Even so, ***HN22***[↑] *Talkington* holds that the military judge is authorized to place sex offender registration in its proper context by informing the members that it is permissible for an accused to address sex offender registration in an unsworn statement, while also informing them that possible collateral consequences of a conviction should play no part in their deliberations. *Id. at 218* (citations omitted).

Considering the holding in *Talkington*, we find Appellant waived our review of the limiting instruction now complained of by making sex offender registration a key part of both unsworn statements, and conclude there is no error to correct on appeal. ***HN23***[↑] Whether an appellant has waived an objection to an instruction is a legal question that this court reviews de novo. *See Davis, 79 M.J. 329, 2020 CAAF LEXIS 76, at *6-7* (findings instruction waived). In presentencing, the defense strategy was designed to highlight Appellant's understanding of having to register as a sex offender as a consequence of his conviction **[*51]** for sexual assault. When contesting the military judge's ruling on the inadmissible attachments, his counsel stated it was "so important" for Appellant to be able to "bring up [having to register as a sex offender] as a matter in his unsworn statement." A key argument the Defense made on this point was that collateral information should be permitted to be given to the members "understanding

[30] Appellant's appellate counsel claims as an assigned error that the instruction, *inter alia*, "amounts to legal schizophrenia":

> On one hand the members are told that the Accused can bring unsworn "information" to their attention; on the other hand they are then instructed to ignore it versus giving it "appropriate consideration." The ultimate effect on the members, and thus the Accused, is that they received no coherent or consistent judicial guidance or "instructions."

Furthermore, Appellant claims the instruction was "simply erroneous as a matter of law" in reply to the Government's answer.

that [the members] are going to be given an instruction, essentially, to disregard [registration] as part of the[ir] deliberation[s]." To this end, Appellant reviewed the draft instructions at trial and was twice asked if there was any objection or request for additional instructions. Both times Appellant answered in the negative. On these facts, we find Appellant conceded to the instruction he now objects to on appeal. Appellant thus waived our consideration of the issue, *see id.*, and we determine to leave his waiver intact, *see* Chin, 75 M.J. at 223 (citation omitted).

5. Mandatory Dismissal Required by Article 56(b)(1), UCMJ

Appellant claims his sentence that included a dismissal required by *Article 56(b)(1), UCMJ, 10 U.S.C. § 856(b)(1)*,[31] violates his right to equal protection under the Fifth Amendment.[32] Appellant argues that an officer who "stabs someone **[*52]** with a hunting knife" would not be required to be so punished, and it follows, Appellant contends, that his sentence that included a mandatory dismissal for sexual assault is "arbitrary, capricious, and unconstitutional."

We are unpersuaded by Appellant's analogy and find his sentence is not unconstitutional on grounds that his punishment included a mandatory dismissal. ***HN24***[↑] In Chapman v. United States, 500 U.S. 453, 467, 111 S. Ct. 1919, 114 L. Ed. 2d 524 (1991), the Supreme Court observed that a statutory sentencing scheme that eschewed "individual degrees of culpability . . . would clearly be constitutional." The Supreme Court noted a statute that imposed a fixed sentence for distributing any quantity of lysergic acid diethylamide (LSD), in any form, with any carrier, would be constitutional. *Id.* It follows that Congress has the power to require a minimum sentence for sexual assault as it does a fixed sentence for LSD. It also follows that whether Congress commanded a minimum sentence for an unrelated offense (e.g. homicide or assault) has no bearing on the constitutionality of a minimum sentence of a punitive discharge for sexual assault.

HN25[↑] The Supreme Court explained that "[a] sentencing scheme providing for 'individualized sentences rests not on constitutional **[*53]** commands, but on public policy enacted into statutes.'" *Id. at 467* (quoting Lockett v. Ohio, 438 U.S. 586, 604-05, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978)). "Congress has the power to define criminal punishments without giving the courts any sentencing discretion," and in fact, "[d]eterminate sentences were found in this country's penal codes from its inception." *Id.* (citations omitted). Although mandatory minimum sentencing schemes "fail to account for the unique circumstances of offenders who warrant a lesser penalty," the Supreme Court has nonetheless held them constitutional. Harris v. United States, 536 U.S. 545, 568-69, 122 S. Ct. 2406, 153 L. Ed. 2d 524 (2002), *overruled on other grounds by* Alleyne v. United States, 570 U.S. 99, 103, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013) (any fact that increases the mandatory minimum must be submitted to the jury); *see also* Harmelin v. Michigan, 501 U.S. 957, 996, 111 S. Ct. 2680, 115 L. Ed. 2d 836 (1991) ("We have drawn the line of required individualized sentencing at capital cases, and see no basis for extending it further.")

Article 56(b)(1), UCMJ, commands that Appellant's punishment must include, at a minimum, dismissal from the service. This is akin to Article of War 95, the predecessor of Article 133, UCMJ, 10 U.S.C. § 933, in which Congress originally provided that "[a]ny officer or cadet who is convicted of conduct unbecoming an officer and a gentleman shall be dismissed from the service," United States v. Timberlake, 18 M.J. 371, 377 (C.M.A. 1984) (Everett, C.J., concurring) (alteration in original). The law does not support Appellant's **[*54]** contention that a mandatory minimum sentence of a dismissal for sexual assault is unconstitutional on grounds that Congress has not proscribed the same minimum sentence for other crimes. We find no violation of equal protection under the Fifth Amendment from Congress' establishment of a minimum sentence for sexual assault.

6. Sentence Appropriateness

Appellant also claims his mandatory dismissal is inappropriately severe. ***HN26***[↑] We review issues of sentence appropriateness de novo. United States v. Lane, 64 M.J. 1, 2 (C.A.A.F. 2006) (citing United States v. Cole, 31 M.J. 270, 272 (C.M.A. 1990)). Our authority to determine sentence appropriateness "reflects the unique history and attributes of the military justice system, [and] includes but is not limited to

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[31] The NDAA for Fiscal Year 2014 modified ***Article 56, UCMJ, 10 U.S.C. § 856***, and required that the punishment for, *inter alia*, violations of Article 120(b) "must include, at a minimum, dismissal or dishonorable discharge," subject to exceptions not relevant to Appellant's case. ***Pub. L. No. 113-66, § 1705(a)(1), 127 Stat. 672, 959 (2013)***.

[32] U.S. Const. amend. V.

considerations of uniformity and evenhandedness of sentencing decisions." *United States v. Sothen, 54 M.J. 294, 296 (C.A.A.F. 2001)* (citations omitted). We may affirm only as much of the sentence as we find correct in law and fact and determine should be approved on the basis of the entire record. *Article 66(c), UCMJ*. Although we have great discretion to determine whether a sentence is appropriate, we have no power to grant mercy. *United States v. Nerad, 69 M.J. 138, 146 (C.A.A.F. 2010)* (citation omitted).

Appellant faced 30 years of confinement, but was sentenced to just six months, along with a mandatory dismissal, forfeiture of $1,000.00 pay per month for six months, **[*55]** and a reprimand. Appellant had known SB for only a few days after meeting her for the first time. We have given individualized consideration to Appellant, the nature and seriousness of his offense, his record of service, and all other matters contained in the record of trial, *see United States v. Anderson, 67 M.J. 703, 705 (A.F. Ct. Crim. App. 2009)* (citations omitted), and conclude Appellant's sentence is appropriate. Although we have the authority to disapprove a mandatory minimum sentence required by *Article 56, UCMJ*, we decline to do so. *See United States v. Kelly, 77 M.J. 404, 408 (C.A.A.F. 2018)*.

F. Military Judge's Alleged Conflict of Interest

Appellant contends his conviction must be set aside because Judge Spath's undisclosed employment negotiations with the United States Department of Justice (DoJ) created a disqualifying appearance of bias. For support, Appellant relies on Judge Spath's denial of his continuance request and ruling that excluded two documents Appellant wanted to attach to his written unsworn statement, both discussed *supra*. We find Judge Spath was not disqualified from presiding as the military judge at Appellant's trial.

1. Additional Background

After Appellant's arraignment and initial *Article 39(a), UCMJ*, session ended on 12 July 2017, Judge Spath, in his capacity as the chief trial **[*56]** judge of the Air Force, detailed himself, on 26 September 2017, to preside at Appellant's court-martial and ordered trial to reconvene on 8 January 2018 at 0830 hours. Judge Spath replaced the previous military judge who had presided over Appellant's arraignment on 11 July 2017 and then retired from active duty. Judge Spath himself was also preparing to retire to become an immigration judge employed by the DoJ.

Judge Spath applied for the DoJ position on 19 November 2015, well before Appellant's trial. As part of his application, he stated he had 5 years of experience as a trial judge and another 15 years of extensive experience as both a prosecutor and criminal defense counsel. He stated he "tried over 100 sexual assault cases" among other felony trials and, as a military judge, he "presided over close to 100 sexual assault trials, and another 50+ trials involving other violent crimes."

The DoJ extended an initial job offer to Judge Spath in March 2017, and in mid-June 2017 established an 18 September 2017 start date. Judge Spath negotiated his salary and start date in a series of emails, including emails between 27 March 2017 and 3 July 2017 that are attached to the appellate record. **[*57]** The job offer and its terms were pending when Appellant's trial reconvened on 8 January 2018 with Judge Spath presiding as the military judge.

2. Analysis

HN27[↑] "An accused has a constitutional right to an impartial judge." *United States v. Butcher, 56 M.J. 87, 90 (C.A.A.F. 2001)* (quoting *United States v. Wright, 52 M.J. 136, 140 (C.A.A.F. 1999)*). R.C.M. 902 outlines the circumstances when a military judge shall disqualify himself or herself in any proceeding. Two distinct grounds include when the "military judge's impartiality might reasonably be questioned," or the military judge has "an interest, financial or otherwise, that could be substantially affected by the outcome of the proceeding." R.C.M. 902(a), 902(b)(5)(B). "'Proceeding' includes pretrial, trial, post-trial, appellate review, or other stages of litigation." R.C.M. 902(c)(1).

HN28[↑] When an appellant challenges a military judge's impartiality for the first time after trial, "'the test is whether, taken as a whole in the context of this trial, a court-martial's legality, fairness, and impartiality were put into doubt' by the military judge's actions." *United States v. Martinez, 70 M.J. 154, 157 (C.A.A.F. 2011)* (quoting *United States v. Burton, 52 M.J. 223, 226 (C.A.A.F. 2000)*). The appearance of impartiality is reviewed on appeal objectively and the military judge's conduct is tested to determine if it "would lead a reasonable [person] knowing all the circumstances to the conclusion that the judge's impartiality **[*58]** might

reasonably be questioned." *United States v. Kincheloe, 14 M.J. 40, 50 (C.M.A. 1982)* (quoting E. Thode, *Reporter's Notes to Code of Judicial Conduct* 60 (1973)) (internal quotation marks omitted); *see also United States v. McIlwain, 66 M.J. 312, 314 (C.A.A.F. 2008)* ("Whether the military judge should disqualify herself is viewed objectively, and is 'assessed not in the mind of the military judge [her]self, but rather in the mind of a reasonable man . . . who has knowledge of all the facts.'" (alterations in original) (quoting *United States v. Wright, 52 M.J. 136, 141 (C.A.A.F. 1999))*).

HN29[] When the issue of disqualification is raised for the first time on appeal, we apply the plain error standard of review. *Martinez, 70 M.J. at 157* (citing *United States v. Jones, 55 M.J. 317, 320 (C.A.A.F. 2001))*. "Plain error occurs when (1) there is error, (2) the error is plain or obvious, and (3) the error results in material prejudice." *Id.* (citing *United States v. Maynard, 66 M.J. 242, 244 (C.A.A.F. 2008))*.

Appellant argues Judge Spath's "flaunting" of his experience as a judge advocate and military judge in his job application was disqualifying. In particular relevance to Appellant's case, he further claims "it is more than reasonable to logically infer" that (1) Judge Spath excluded two attachments that referenced sex offender registration consequences so as not to jeopardize his prospective DoJ employment; and (2) Judge Spath denied Appellant's motion for a continuance because he was clearing his docket **[*59]** in preparation to begin his immigration judge duties. We address each contention in turn.

First, we find no basis for disqualification in Judge Spath's job application or his negotiations with the DoJ. He described his trial and judicial experience by reference to his years of practice and the number and types of cases he tried. He did not gild his communications with DoJ personnel in a manner that could raise doubts about the legality, fairness, or impartiality of Appellant's trial—by boasting of, for example, a record of convictions or expediency in moving cases as a trial judge. Appellant draws parallels with the disqualifying interest Judge Spath was found to have in *In re Al-Nashiri, 921 F.3d 224, 440 U.S. App. D.C. 260 (D.C. Cir. 2019)*, where he presided over Al-Nashiri's military commission. The United States Court of Appeals for the District of Columbia Circuit observed that judges may not sit in judgment on cases in which their prospective employers are a party:

> the Attorney General was a participant in Al-Nashiri's case from start to finish: he has consulted on commission trial procedures, he has loaned out one of his lawyers, and he will play a role in defending any conviction on appeal. The challenge [Judge] Spath faced, then, was to treat the **[*60]** Justice Department with neutral disinterest in his courtroom while communicating significant personal interest in his job application. Any person, judge or not, could be forgiven for struggling to navigate such a sensitive situation. And that is precisely why judges are forbidden from even trying.

Id. at 236-37 (citation omitted). Ultimately, the court found that "[Judge] Spath's job application, therefore, cast an intolerable cloud of partiality over his subsequent judicial conduct." *Id. at 237*.

But the circumstances of Appellant's court-martial are different than Al-Nashiri's military commission. The DoJ was not a party to Appellant's trial and did not have an identifiable interest in its result, nor was the Attorney General or anyone in the DoJ a participant. Neither the DoJ nor the Attorney General has a close association with military courts-martial generally, or Appellant's case specifically. Appellant cites one connection with the DoJ: Appellant claims the DoJ's role overseeing and administering the SORNA was disqualifying because of Judge Spath's "rulings on various SORNA issues litigated below." In fact, just one of Judge Spath's rulings tangentially related to SORNA—a ruling excluding two attachments **[*61]** that referenced sex offender registration Appellant wanted to give to the members as part of his written un-sworn statement. However, the connection of this ruling and SORNA is tenuous. Judge Spath neither applied SORNA nor interpreted, much less undermined or reinforced, the Government's reliance on any provision. Rather, his ruling addressed the military presentencing procedures in R.C.M. 1001, a rule promulgated by the President, and related to the permissible bounds of an appellant's unsworn statement. There is no reason to believe that a DoJ hiring official would hear about the ruling and be pleased or displeased, or that Judge Spath believed a DoJ hiring official would be aware of his ruling or that it would be any matter of consequence. This case is therefore distinguishable from the disqualification found in *In re Al-Nashiri*.

Second, there is no evidence in the record that Judge Spath denied Appellant's continuance motion for personal reasons or that an objective observer knowing the facts would conclude that he did. No evidence or reasonable inference suggests that Judge Spath was

under pressure to move Appellant's case hurriedly so that he could retire. As the chief trial judge, Judge **[*62]** Spath had plenary detailing authority which would have allowed him to identify any trial judge in the Air Force to preside at Appellant's trial if he concluded Appellant met his burden to show a continuance was warranted. *See* ***HN30***[] Air Force Manual 51-204, *United States Air Force Judiciary and Air Force Trial Judiciary*, ¶ 1.3 (18 Jan. 2008, Incorporating Through Change 2, 9 Oct. 2014) (the duties of the chief trial judge include "detailing judges to all Air Force General and Special courts-martial.").[33] Even if there was some evidence that Judge Spath was under pressure to keep a post-retirement timeline, and there is none, he could have detailed a judge other than himself to preside at Appellant's trial if a continuance was warranted.

We find Judge Spath was not disqualified from presiding at Appellant's court-martial. An objective observer knowing all of the facts would not question Judge Spath's impartiality, and there is no evidence in the trial or appellate record that Judge Spath had an interest that could be substantially affected by the outcome of the proceeding. *See* R.C.M. 902(a), 902(b)(5)(B). ***HN31***[] "There is a strong presumption that a judge is impartial, **[*63]** and a party seeking to demonstrate bias must overcome a high hurdle, particularly when the alleged bias involves actions taken in conjunction with judicial proceedings." *United States v. Quintanilla, 56 M.J. 37, 44 (C.A.A.F. 2001)* (citation omitted). Appellant has not overcome the presumption. We find no error, much less plain and obvious error, on this issue.

G. Post-Trial

In the post-trial proceeding, Appellant was represented by both his CDC and military defense counsel, Captain (Capt) JK.[34] In an assignment of error raised by the CDC on Appellant's behalf, Appellant claims he was prejudiced by (1) the failure of the base legal office to serve the record of trial (ROT) and the staff judge advocate's recommendation (SJAR) on his CDC; and (2) the refusal by the convening authority's staff judge advocate to recall Appellant's case after the convening authority had taken action so that the convening authority would have the benefit of an *Article 38(c), UCMJ*, brief that the CDC submitted after the deadline to submit clemency. Appellant claims both procedural errors denied Appellant of his right to procedural due process.

In a related issue raised by Appellant, he argues his military defense counsel was ineffective because he failed to "adequately **[*64]** communicate to the government the role and status of [the] CDC in post-trial proceedings."[35] Appellant avers that both he and his CDC "communicated to [Appellant's] detailed military defense counsel the role that [the] CDC had been retained to play in post-trial processing, and submission of clemency and related matters to the convening authority." Appellant explains, "If my detailed military defense counsel in fact informed the legal office that my CDC was only acting as appellate counsel, as alleged by the government, that would be false and contrary to my express wishes."

1. Additional Background

In a final session of the court held on 11 January 2018 while the members deliberated on their sentence, the military judge conducted an inquiry with Appellant and one of his two detailed military defense counsel, Capt JK, to ensure Appellant had been advised both orally and in writing of his post-trial and appellate rights. The military judge asked Capt JK if he was "going to be responsible for post-trial processing?" Capt JK responded in the affirmative and submitted a post-trial rights advisement dated the first day of trial that Appellant and both military counsel had signed.

*a. Capt JK's [*65] Clemency Submission on Behalf of Appellant*

Capt JK actively represented Appellant after the members sentenced Appellant to a dismissal, to be confined for six months, to forfeit $1,000.00 of pay per month for six months, and to be reprimanded. On 16 January 2018, Capt JK sent a request to the convening authority to defer the adjudged forfeitures until action and waive mandatory forfeitures for a period of six

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[33] Superseded by Air Force Instruction 51-204, United States Air Force Judiciary and Air Force Trial Judiciary, ¶ 2.3.1 (10 Sep. 2018).

[34] Capt JK promoted to major after trial.

[35] In response to an order of this court, Appellant's three appellate counsel identified military appellate counsel as "primary" counsel on the assignment of error that Appellant raised pursuant to *United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982)*.

months for the benefit of Appellant's dependent children. *See* Articles 57(a)(2), 58b(b), UCMJ, 10 U.S.C. §§ 857(a)(2), 858b(b).[36] Capt JK also certified the transcript, receipted for the SJAR, requested and received an extension to submit matters, and submitted his own attorney clemency memo identifying himself as Appellant's defense counsel.

In his 3 May 2018 attorney clemency memo, Capt JK responded to the SJAR dated 16 April 2018. On Appellant's behalf, Capt JK advocated the military judge erred in (1) denying Appellant's motion for a continuance to allow Appellant to be represented at trial by the CDC; (2) denying Appellant's motion to compel discovery of text messages between SB and her friend FK; and (3) denying a request by a court member to receive evidence of a statement Appellant made to the Brevard **[*66]** County (Florida) Sheriff's Office on grounds that the statement was hearsay and its probative value was outweighed by other considerations under Mil. R. Evid. 403.

Capt JK correctly informed the convening authority that his power "to modify the findings and sentence in [Appellant's] case is greatly restricted." He noted the convening authority had the power to reduce or set aside the adjudged confinement, forfeitures, and reprimand, but could not set aside the findings of guilty or disapprove the dismissal. Capt JK asked the convening authority to grant clemency by disapproving the $1,000.00 forfeitures for six months and to reduce Appellant's confinement by 32 days. Along with the relief Capt JK requested as clemency,[37] Capt JK asked the convening authority to write a letter in support of Appellant's claims of error. As entreated, the letter would advocate that the convening authority would have set aside the findings or ordered a new trial if he had the power to do so; it also would have recommended that the Secretary of the Air Force (SECAF) substitute an administrative discharge for the dismissal as authorized by Article 74(b), UCMJ, 10 U.S.C. § 874(b).

Appellant's own submission, also dated 3 May 2018, echoed **[*67]** the clemency and other relief Capt JK requested on Appellant's behalf. Appellant requested the convening authority to "consider the letter from [his] Defense Counsel, Capt [JK]" along with other matters that were submitted in clemency. He also discussed the consequences of the mandatory dismissal and sex offender registration. Five days later, on 8 May 2018, the convening authority took action and denied the clemency and other relief that Appellant and Capt JK had urged the convening authority to grant. There is no evidence in the record or reason to believe that the convening authority wrote the letter to the SECAF that Appellant and Capt JK asked for, much less favored either outcome Appellant sought.

b. Conduct of Counsel in Appellant's Post-Trial Representation

Appellant's CDC learned that the convening authority took action a week after it happened. In a sworn affirmation to this court, the CDC provided emails exchanged with Capt JK, and with personnel at the base legal office who tried the case and the convening authority's legal staff. The CDC explained he received the SJAR sometime on 15 May 2018, when he learned the convening authority had already taken action, but did not receive **[*68]** a copy of the authenticated ROT he needed to finalize an Article 38(c), UCMJ, brief to identify legal errors to the convening authority.[38]

In response to the CDC's affirmation and Appellant's claims of ineffective assistance of his military defense counsel, the Government provided declarations from the assistant trial counsel and the chief of military justice on the convening authority's legal staff. Additionally, we ordered and received a declaration from Capt JK. We have considered whether a post-trial evidentiary hearing is required to resolve any factual disputes and are convinced such a hearing is unnecessary. *See* United States v. Ginn, 47 M.J. 236, 248 (C.A.A.F. 1997); United States v. DuBay, 17 C.M.A. 147, 37 C.M.R. 411, 413

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[36] On 19 January 2018, the convening authority denied the request to defer adjudged and mandatory forfeitures, and, effective 25 January 2018, granted waiver of $1,000.00 of the mandatory forfeitures for a period of six months, upon expiration of Appellant's term of service, or until release from confinement, whichever was sooner, to be paid for the benefit of Appellant's dependent children.

[37] *See* Article 60(b)(1), UCMJ, 10 U.S.C. § 860(b)(1) ("The accused may submit to the convening authority matters for consideration by the convening authority with respect to the findings and the sentence."); *see also* R.C.M. 1105(b)(1) ("The accused may submit to the convening authority any matters that may reasonably tend to affect the convening authority's decision whether to disapprove any findings of guilty or to approve the sentence, except as may be limited by R.C.M. 1107(b)(3)(C).").

[38] Appellant's CDC avers he did receive a copy of the "*unauthenticated* ROT for the January 2018 proceedings."

(C.M.A. 1967) (per curiam). Pared down to the relevant facts, the post-trial affirmation, declarations, and attachments thereto are generally consistent and indicate the following facts.

After sentencing, the CDC and Capt JK ultimately resolved that both attorneys would represent Appellant in seeking clemency and other relief from the convening authority, and the CDC would represent Appellant in his appeal. Each attorney undertook to prepare and separately submit matters to the convening authority. Capt JK would assist Appellant with his personal clemency request and **[*69]** submit it along with a supporting attorney memorandum that Capt JK would prepare and sign. At the same time the CDC would prepare and submit an *Article 38(c), UCMJ*, brief, that identified errors in Appellant's trial.

Legal office personnel at the base where the case was tried and on the convening authority's staff had a different understanding. Above all, their actions show they relied on Capt JK's acknowledgement at trial that he was responsible for post-trial processing. The Government attorneys believed that Capt JK alone was responsible for representing Appellant on post-trial matters and that Appellant's CDC would be representing Appellant on appeal. Their beliefs were reinforced by two important facts evident from the declarations: first, that Appellant's CDC did not send a notice of representation to the Government or formally countermand Capt JK's acknowledgement on the record that Capt JK would handle post-trial processing; and second, Appellant identified his CDC as appellate counsel on AF Form 304, *Request for Appellate Defense Counsel*, on the day his court-martial adjourned. The understanding of the Government's attorneys apparently did not change when Capt JK, on 13 April **[*70]** 2018 and on the CDC's behalf, requested the legal office to make a copy of the authenticated ROT and send it to the CDC. Capt JK's request did not specify whether the CDC needed the ROT for the purpose of clemency, appeal, or some other purpose. Capt JK had been provided his own copy for use while preparing the response to the SJAR. *See* R.C.M. 1106(f)(3).

On 16 April 2018, and in accordance with R.C.M. 1106(f)(2), the legal office served Capt JK, by email, with the SJAR. Appellant receipted for his copy of the SJAR on 18 April 2018.[39] Appellant's CDC was not served with the SJAR. Capt JK erroneously believed the legal office would provide Appellant's CDC with a copy guided by the misunderstanding that the Government had a "responsibility to provide this type of document to all defense counsel involved in the post-trial process." Not coincidentally, the CDC asserts as much in this appeal.

Appellant had a ten-day period to submit clemency. *See* R.C.M. 1105(c)(1). As the 28 April 2018 deadline drew near, Capt JK "continued to work on [his] attorney memorandum for [Appellant]'s clemency submission" and "worked with [Appellant] on his clemency letter and was in communication with [Appellant's CDC]." Capt JK's "communication with [Appellant's **[*71]** CDC] included emailing [Appellant]'s draft clemency letter with [Capt JK's] suggestions for his input. This was done at [Appellant]'s request and was emailed to [Appellant's CDC] on 20 April 2018." There is nothing in the post-trial declarations to suggest that the CDC asked Capt JK to provide, or that Capt JK did provide, the SJAR he received by email from the Government.[40]

Capt JK "talked to [Appellant's CDC] about [Appellant]'s approaching clemency submission deadline." Even though Appellant's CDC supposed he would receive a copy of the SJAR from the Government and had not received one himself, nonetheless, on 24 April 2018, the CDC asked Capt JK to request an extension from the convening authority to allow for additional time to submit matters. Capt JK avers he had separate telephone conversations with two attorneys in the base legal office and let them know he "would be requesting an extension for [Appellant]'s clemency submission." He told one of the attorneys that the justification for the request was "due in part to [Capt JK's] workload and leave and in part for [Appellant's CDC] *who would also be submitting matters* for [Appellant]'s clemency." (Emphasis added). This is the first **[*72]** and only clear indication in the post-trial declarations that anyone in the Govern-ment should have been aware that Appellant's

[39] Appellant receipted for a copy of the record of trial on 17 April 2018.

[40] Included as an attachment to the affirmation of Appellant's CDC is an email he sent to a judge advocate on the convening authority's staff stating the CDC "received a copy of the SJAR from [Capt JK on 15 May 2018] when [Capt JK] found out that [the CDC] had not been served with a copy." We decline to speculate why one counsel did not share the SJAR with the other between 16 April 2018 and 3 May 2018, the date clemency was submitted. However, the SJAR was apparently of no consequence to the CDC's part of the representation as neither defense counsel aver that the CDC asked Capt JK to send him a copy.

CDC expected to submit matters separate from the submission the Government expected to receive from Appellant and Capt JK.[41]

On the other hand, Capt JK's written extension request to the convening authority and his staff judge advocate (SJA) made no mention that more time was needed for Appellant's CDC to submit matters. It also did not reference that Appellant's CDC had not received an authenticated copy of the ROT or a copy of the SJAR and that more time was needed for the CDC's review of those documents. And, unlike Capt JK's verbal conversation with an attorney from the base legal office, his written request that was approved by the SJA to the convening authority—who was not the supervisor of the base legal office personnel whom **[*73]** Capt JK spoke to on the telephone—did not mention that Appellant's CDC was preparing a separate submission and also needed an extension. Rather, the request asked the Government for a delay until Friday, 4 May 2018 at 1630 hours because Capt JK simply needed "more time to speak with [Appellant] and coordinate with [Appellant's] civilian counsel." The extension was granted with a new deadline of 4 May 2018; significantly, on 25 April 2018, Capt JK informed the CDC of the new deadline.

On 2 May 2018, Capt JK let Appellant's CDC know he was prepared to submit Appellant's clemency matters with his accompanying attorney memorandum the next day so that the convening authority's legal staff would have it before 4 May 2018. Capt JK informed the CDC that he would ensure the CDC was copied on the submission so that the CDC would have the contact information for the attorneys at the base legal office and know to whom he should send his *Article 38(c), UCMJ*, brief.

True to Capt JK's intention to meet the 4 May 2018 deadline, on 3 May 2018, Capt JK's paralegal submitted Capt JK's attorney clemency memo along with Appellant's personal clemency submission. Appellant's CDC was copied on the email, which **[*74]** read, "Please see attached clemency request for [Appellant] and feel free to contact our office with any questions." Thereafter, neither the CDC, nor Capt JK on the CDC's behalf, alerted the Government that the submission was incomplete as the CDC intended to submit a brief. Capt JK avers he "believed that [Appellant's CDC] would subsequently be submitting his *Article 38[(c), UCMJ*,] brief to them before the clemency deadline." In a memorandum for record Capt JK composed on 21 June 2018 that was attached to his declaration, Capt JK states "[i]t was not until on or about 14 May 2018, that [he] learned [Appellant's CDC] did not submit his brief since he was waiting for the ROT and SJAR to be served to him from the legal office." Coincidentally, Appellant was released from confinement on 14 May 2018.

In the days that followed, Appellant's CDC was unsuccessful in convincing the Government to withdraw the action and recall Appellant's case so that the convening authority would have the benefit of his *Article 38(c), UCMJ*, brief. Appellant's record of trial was docketed with this court on 22 May 2018. On 30 May 2018, this court received a memorandum from the Air Force Legal Operations Agency, **[*75]** Military Justice Division, Appellate Records Branch (AFLOA/JAJM), identifying the CDC's 40-page brief dated 14 May 2018 for inclusion in the original record of trial.[42] The JAJM memorandum was signed as having been received by representatives of the Appellate Government Division (JAJG) and the Appellate Defense Division (JAJA). The brief is included in the record of trial.

2. Law

HN32[↑] "The standard of review for determining whether post-trial processing was properly completed is de novo." *United States v. Sheffield, 60 M.J. 591, 593 (A.F. Ct. Crim. App. 2004)* (citing *United States v. Kho, 54 M.J. 63 (C.A.A.F. 2000)*). An error in post-trial processing results in material prejudice to the substantial rights of an appellant under *Article 59(a), UCMJ, 10 U.S.C. § 859(a)*, if an appellant "makes some colorable showing of possible prejudice." *United States*

[41] The CDC avers he:

> personally communicated with the Assistant *Trial* Counsel [ATC] the fact that he needed a copy of the RoT, which the ATC agreed to provide and CDC provided his office mailing address to him, as CDC was going to be submitting matters for the [staff judge advocate] and [convening authority]'s post-trial consideration in this case . . . .

It is unclear from the CDC's affirmation what exactly the CDC communicated to the ATC other than he required a copy of the record of trial.

[42] A second document included with the brief was a 3-page memorandum regarding "Excess Appellate Leave Issues" that was signed by Appellant's CDC, which the court accepted for inclusion in the record of trial.

v. Wheelus, 49 M.J. 283, 289 (C.A.A.F. 1998) (quoting *United States v. Chatman, 46 M.J. 321, 323-34 (C.A.A.F. 1997))*. Given our superior court's reliance on "the highly discretionary nature of the convening authority's clemency power, the threshold for showing prejudice is low." *United States v. Lee, 52 M.J. 51, 53 (C.A.A.F. 1999)*.

HN33[↑] The *Sixth Amendment* guarantees an accused the right to effective assistance of counsel. *United States v. Gilley, 56 M.J. 113, 124 (C.A.A.F. 2001)*. In assessing the effectiveness of counsel, we apply the standard set forth in *Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)*, and begin with the presumption of competence announced in *United States v. Cronic, 466 U.S. 648, 658, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984)*. *Gilley, 56 M.J. at 124* (citing *United States v. Grigoruk, 52 M.J. 312, 315 (C.A.A.F. 2000))*.

HN34[↑] We review allegations of ineffective assistance of counsel de novo. *United States v. Gooch, 69 M.J. 353, 362 (C.A.A.F. 2011)* (citing *United States v. Mazza, 67 M.J. 470, 474 (C.A.A.F. 2009)*. "To prevail on an ineffective **[*76]** assistance claim, the appellant bears the burden of proving that the performance of defense counsel was deficient" and that this deficiency resulted in prejudice. *United States v. Captain, 75 M.J. 99, 103 (C.A.A.F. 2016)* (citing *Strickland, 466 U.S. at 698*). Accordingly, we consider "whether counsel's performance fell below an objective standard of reasonableness." *United States v. Gutierrez, 66 M.J. 329, 331 (C.A.A.F. 2008)* (citations omitted). An appellate court must "evaluate the combined efforts of the defense as a team rather than evaluating the individual shortcomings of any single counsel." *United States v. Garcia, 59 M.J. 447, 450 (C.A.A.F. 2004)* (citing *United States v. McConnell, 55 M.J. 479, 481 (C.A.A.F. 2001))*.

3. Analysis

All too often we see careless mistakes by government attorneys and defense counsel during post-trial processing. But this is the unusual case where an appellant and his civilian counsel fault the Government and the military defense counsel for the CDC's own missed deadline—one that the military defense counsel timely requested in part on the CDC's behalf and the CDC knew had been granted. Still, resolution of Appellant's assigned errors are straightforward even if the reasons underlying the failures in communication on Appellant's team are peculiar. Pared down to the relevant facts, the declarations reveal the Government complied with standards applicable to post-trial processing, and Appellant has shown neither **[*77]** deficiency in the combined performance of his defense counsel nor a colorable showing of possible prejudice by the convening authority taking action without the benefit of the *Article 38(c), UCMJ*, brief the CDC had prepared.

HN35[↑] Rule for Courts-Martial 1106(f)(2) lists the order of precedence on whom the SJAR is served if an accused fails to designate a specific counsel at trial. The SJAR is served on one counsel only, and civilian counsel is first in the order of precedence if an accused does not so designate. Because Capt JK identified he was counsel of record for post-trial processing, the order of precedence is inapplicable, and the Government met its obligation under R.C.M. 1106(f)(2) by serving the SJAR on Capt JK and him alone. *See United States v. Washington, 45 M.J. 497, 498 (C.A.A.F. 1997)* (finding error after appellant requested his military counsel be served with the SJAR and ROT, but service was accomplished on appellant's civilian counsel instead). There is no evidence in the record of proceedings—or indication in any declaration or affirmation—that the CDC sent notice of representation to the Government that might have changed this designation or the understanding of any legal office personnel.[43] On these facts it was not error for the Government to refuse to withdraw the action after **[*78]** faithfully observing the R.C.M. 1106(f)(2) procedures and granting in full Appellant's request for an extension to submit matters.

Appellant had a 4 May 2018, 1630 hour deadline to submit clemency, which both defense counsel knew had been extended once. Each counsel undertook a well-defined responsibility. Capt JK capably met his. Despite asking Capt JK to request an extension and knowing a new deadline had been set, Appellant's CDC did not submit his *Article 38(c), UCMJ*, brief or request a

[43] Appellant faults his military defense counsel for failing to make clear to the Government that the scope of the CDC's representation included preparing a post-trial submission to the convening authority. We find this was the CDC's responsibility, and his alone, and is customarily done by sending notice to an adverse party that defines the scope of the representation undertaken by the attorney. As discussed previously, the military judge also found Appellant's CDC did not enter a formal appearance during trial, even after receiving a retainer fee.

second extension so that his brief would be timely.[44] Once the clemency deadline passed, Government attorneys could reasonably conclude Appellant's clemency submission was complete: the matters the Government did receive, which the CDC also received because the defense paralegal included him on the email, made no reference to a separate submission that would be forthcoming from the CDC. For these reasons, we find the Government did not err in post-trial processing and Appellant was not denied his right to procedural due process.

Even if we presume deficiency of the defense team, *see* Garcia, 59 M.J. at 450, we find no colorable showing of possible prejudice, *see* Wheelus, 49 M.J. at 289, and thus no grounds to order post-trial processing anew. The convening authority **[*79]** had the power to reduce or set aside Appellant's adjudged confinement, forfeitures, and reprimand, but could not set aside the findings of guilty or disapprove the dismissal. Consistent with these restrictions, and citing the power the convening authority did have under Article 60, UCMJ, 10 U.S.C. § 860, Capt JK's submission asked the convening authority to disapprove the $1,000.00 forfeitures for six months and to reduce Appellant's confinement by 32 days. His request was in harmony in all respects with the relief Appellant wanted and the clemency the convening authority had the power grant.

In contrast to Capt JK's submission, the Article 38(c), UCMJ, brief is silent about clemency and advocates for relief that the convening authority had no power to grant. Its focus, much like Appellant's appeal to this court, are errors Appellant claims occurred at trial. Appellant's CDC advocated for retrial on grounds that Appellant was denied the right to be represented by his civilian counsel of choice. He advocated for the findings and sentence to "be disapproved and reversed, as constitutionally invalid" and that Appellant's "sentence herein should be set aside and a rehearing as to an appropriate sentence **[*80]** for this Accused, ordered." The convening authority did not have the power to do these things.[45] Appellant's CDC did not address, as Capt JK did, either the power the convening authority did have or the clemency Appellant asked the convening authority to grant.

More to the point, although Appellant's Article 38(c), UCMJ, brief identifies errors, it does not seek clemency or any other relief the convening authority might have given. Even so, Appellant's CDC argues "prejudice *per se*" and remand for post-trial processing anew because the action "fails to acknowledge that the Military Judge ordered that [Appellant] be credited with 16 days of pretrial confinement in the Brevard County [Florida] Jail." (Second alteration in original). This too misses the mark. The convening authority's action was not incomplete because ***HN36***[] the convening authority must only include credit for *illegal* pretrial confinement in the action. R.C.M. 1107(f)(4)(F). The action was thus proper without stating the 16 days of administrative credit Appellant was due. In fact Appellant was properly credited with these days on the DD Form 2707-1, *Department of Defense Report of Result of Trial*, which is included in the record of trial with the confinement **[*81]** order. Further, Appellant's CDC notes in his Statement of the Case as part of his Article 38(c), UCMJ, brief that Appellant had been released from confinement on 14 May 2018 after serving a six-month sentence that began on 11 January 2018.

Because Capt JK submitted clemency on Appellant's behalf and his request was clemency Appellant sought and the convening authority could grant, this is not a case where an appellant was effectively without representation during the post-trial process and prejudice is presumed. *See* United States v. Knight, 53 M.J. 340 (C.A.A.F. 2000) (citations omitted).

HN37[] We evaluate trial defense counsel's performance not by the success of their strategy, *see* United States v. Dewrell, 55 M.J. 131, 136 (C.A.A.F. 2001) (quoting United States v. Hughes, 48 M.J. 700, 718 (A.F. Ct. Crim. App. 1998)), but by an objective standard of reasonableness. Gutierrez, 66 M.J. at 331 (citations omitted). Having evaluated the combined actions of both defense counsel in their post-trial representation of Appellant, *see* Garcia, 59 M.J. at 450, we find their performance as a whole did not fall below applicable standards even though the convening authority took action without the benefit of the Article 38(c), UCMJ, brief.

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[44] Appellant's CDC could have asked the convening authority to push the deadline to 18 May 2018. *See* R.C.M. 1105(c)(1) ("If, within the 10-day period [to submit matters], the accused shows that additional time is required for the accused to submit such matters, the convening authority or that authority's staff judge advocate may, for good cause, extend the 10-day period for not more than 20 additional days.").

[45] *See* R.C.M. 1102 (proceedings in revision and Article 39(a), UCMJ, post-trial sessions); R.C.M. 1107(e) (ordering rehearing or other trial); R.C.M. 1210 (new trial); *see generally* Articles 60(f) and 73, U.C.M.J, 10 U.S.C. §§ 860(f), 873.

H. Remaining Allegations of Ineffective Assistance of Counsel

After Appellant submitted his assignments of error and the Government answered, Appellant submitted a declaration pursuant to *United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982)*, personally **[*82]** setting forth nine allegations of ineffective assistance of counsel by the two military defense counsel who represented him at trial. One of the counsel, Capt JK, assisted Appellant in post-trial processing as described above. In response to Appellant's claims, we ordered and received declarations from both trial defense counsel, which refute Appellant's claims and are generally consistent with one another. We have considered whether a post-trial evidentiary hearing is required to resolve any factual disputes and are convinced such a hearing is unnecessary. *See Ginn, 47 M.J. at 248*; *DuBay, 37 C.M.R. at 413*.

As discussed previously, Appellant personally alleges that the military defense counsel who represented him in clemency was ineffective in that he failed to adequately communicate with Appellant's retained CDC and the Government regarding post-trial representation and the desire of the CDC to submit matters in clemency. In addition, Appellant contends that his military defense counsel were ineffective in eight assignments of error, which we considered and summarily resolve here. Appellant declares his second team of detailed military defense counsel failed to: (1) investigate the alleged offense; (2) challenge the Government's **[*83]** denial of Appellant's request for investigative assistance; (3) refrain from dissuading Appellant that hiring an investigator at personal expense was not necessary or worthwhile; (4) make timely objections at trial; (5) challenge the general prohibition on using the good-soldier defense and offer evidence and present argument of a good-soldier defense; (6) present photographs or a to-scale floor plan of the scene of the alleged crime; (7) advise Appellant of the advantages of taking the stand in his own defense; and (8) clarify and preserve the record regarding the retention of civilian defense counsel.[46]

We find these issues do not require further discussion and are without merit. *See United States v. Matias, 25 M.J. 356, 361 (C.M.A. 1987)*. We further conclude from our review of the record and all post-trial declarations that Appellant was neither deprived of a fair trial nor was the trial outcome unreliable. *See Strickland, 466 U.S. at 696*. Accordingly, we find Appellant's claims of ineffective assistance of counsel do not warrant relief.

I. Timeliness of Appellate Review

HN38[↑] We review de novo whether an appellant has been denied the due process right to a speedy post-trial review and appeal. *United States v. Moreno, 63 M.J. 129, 135 (C.A.A.F. 2006)* (citations omitted). A presumption of unreasonable delay arises when appellate **[*84]** review is not completed and a decision is not rendered within 18 months of the case being docketed. *Id. at 142*. When a case is not completed within 18 months, such a delay is presumptively unreasonable and triggers an analysis of the four factors laid out in *Barker v. Wingo, 407 U.S. 514, 530, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972)*: "(1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to timely review and appeal; and (4) prejudice." *Moreno, 63 M.J. at 135* (citations omitted).

Appellant's case was originally docketed with the court on 22 May 2018. The overall delay in failing to render this decision by 22 November 2019 is facially unreasonable. *See Moreno, 63 M.J. at 142*. However, we determine no violation of Appellant's right to due process and a speedy post-trial review and appeal. Analyzing the *Barker* factors, we find the delay is not excessively long. The reasons for the delay include the time required for Appellant to file his brief on 23 July 2019, and the Government to file its answer on 5 September 2019. After Appellant's reply on 30 September 2019, ten days later on 10 October 2019, Appellant submitted a declaration identifying nine allegations of ineffective assistance of counsel, which the Government answered on 2 January 2020, and Appellant replied **[*85]** on 14 January 2020. We granted 12 enlargements of time—11 for Appellant and 1 for the Government—resulting in the scheduling of a status conference with all appellate counsel before a panel judge. This court issued 11 orders, ruled on 6 out-of-time filings submitted by Appellant and 1 from the Government, and returned 4 of Appellant's filings with no action for non-compliance with this court's Rules of Practice and Procedure.

The court affirms the findings and sentence in this case

[46] Although Appellant was represented by two former detailed military defense counsel when the deficiencies underlying the first three of these alleged errors occurred, Appellant claims ineffective representation from his second defense team only.

after carefully examining numerous assignments of error, including nine alleged deficiencies of Appellant's trial defense counsel that the parties had not completed briefing by 22 November 2019, after which date the appellate delay was facially unreasonable. *See id.* However, Appellant has not asserted his right to speedy appellate review or pointed to any particular prejudice resulting from the presumptively unreasonable delay, and we find none. Finding no *Barker* prejudice, we also find the delay is not so egregious that it adversely affects the public's perception of the fairness and integrity of the military justice system. *See United States v. Toohey, 63 M.J. 353, 362 (C.A.A.F. 2006)*. As a result, there is no due process violation. *See id.* In addition, we determine **[*86]** that Appellant is not due relief even in the absence of a due process violation. *See United States v. Tardif, 57 M.J. 219, 223-24 (C.A.A.F. 2002)*. Applying the factors articulated in *United States v. Gay, 74 M.J. 736, 744 (A.F. Ct. Crim. App. 2015)*, *aff'd*, *75 M.J. 264 (C.A.A.F. 2016)*, we find the delay in appellate review justified and relief for Appellant unwarranted.

III. CONCLUSION

The approved findings and sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of Appellant occurred. *Articles 59(a)* and *66(c), UCMJ*, *10 U.S.C. §§ 859(a)*, *866(c)*. Accordingly, the findings and the sentence are **AFFIRMED**.

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